No. 13-1174

IN THE
Supreme Court of the United States

ELLEN GELBOIM, ET AL.,
Petitioners,

v.

BANK OF AMERICA CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF RETIRED UNITED STATES DISTRICT JUDGES IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI[1]

Amici are former United States District Judges with extensive experience handling complex, consolidated litigation, both as presiding judges and as members of the Judicial Panel on Multidistrict Litigation. They submit this brief to elaborate on the perspective of the District Judge in those complicated circumstances, and to shed light on why the District Judge is best positioned to assess when one or more constituent claims may be appropriate for separate appeal while the rest of the consolidated litigation remains pending.

The Honorable **Louis Bechtle** was a United States District Judge for the Eastern District of Pennsylvania from 1972 to 2001, and Chief Judge from 1990 to 1993. From 1994 to 2001, by appointment of the Chief Justice, he served as a member of the Judicial Panel on Multidistrict Litigation. Judge Bechtle also presided over numerous MDLs as a District Judge, including *In re Diet Drugs Products Liability Litigation*, MDL No. 1203, *see*, *e.g.*, *Collins v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.)*, No. 98-20299, 1998 U.S. Dist. LEXIS 18109, at *2 (E.D. Pa. Nov. 16, 1998) ("'fen-phen' diet drug litigation"); *In re Orthopedic Bone Screw Products Liability Litigation*, MDL No. 1014, *e.g.*, 1997 U.S. Dist. LEXIS 17250 (E.D. Pa. Aug. 22, 1997) ("2,300 civil actions involving over 5,000 plaintiffs"); and *In re Bexar County Health Facilities Development Corporation*,

[1] The parties' consents to the filing of amicus curiae briefs are on file with the Clerk. No counsel for any party authored any portion of this brief, and no one other than the *amici curiae* and their counsel provided any monetary contribution to its preparation or submission.

MDL No. 768, *e.g.*, 1992 U.S. Dist. LEXIS 15967, at *1 (E.D. Pa. Sept. 25, 1992) (consolidated securities fraud actions). In addition, Judge Bechtle was appointed by the Chief Justice to facilitate settlement in *In re Air Crash Disaster*, MDL No. 742, *see Polec v. Northwest Airlines (In re Air Crash Disaster)*, 86 F.3d 498, 526 (6th Cir. 1996), and *In re Fire Disaster at Dupont Plaza Hotel*, MDL No. 721. *See In re Nineteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litigation*, 982 F.2d 603, 605 (1st Cir. 1992).

The Honorable **W. Royal Furgeson, Jr.** was a United States District Judge for the Western District of Texas from 1994 through 2013. From 2008 to 2013, by appointment of the Chief Justice, he served as a member of the Judicial Panel on Multidistrict Litigation. Judge Furgeson has served as President of the Federal Judges Association, as Chairman of the Judicial Resources Committee of the Judicial Conference of the United States, and as a member of the Judicial Branch Committee of the Judicial Conference of the United States. He is currently Dean of the University of North Texas at Dallas College of Law.

The Honorable **Barbara S. Jones** was a United States District Judge for the Southern District of New York from 1996 through 2013. From 2010 to 2012, by appointment of the Chief Justice, she served as a member of the Judicial Panel on Multidistrict Litigation. As a District Judge, Judge Jones presided over numerous Multidistrict Litigations and other high-profile, complex consolidated cases. *See, e.g.*, *In re Omeprazole Patent Litigation*, MDL No. 1291, 1999 U.S. Dist. LEXIS 12589 (J.P.M.L. Aug. 12, 1999) (centralizing actions "concerning the validity of

. . . various patents relating to [the pharmaceutical] omeprazole"); *In re Satyam Computer Servs., Ltd. Sec. Litig.*, MDL No. 2027, 609 F. Supp. 2d 1375 (J.P.M.L. 2009) (centralizing securities actions "aris[ing] from a purported massive financial scandal"); *Goldstein v. Puda Coal, Inc.*, 827 F. Supp. 2d 348 (S.D.N.Y. 2011) (consolidating eleven securities actions); *In re Salomon Analyst Litig.*, No. 02-3687 *et al.*, 2003 U.S. Dist. LEXIS 905, at *1-2 (S.D.N.Y. Jan. 24, 2003) (consolidating "approximately eighty actions" asserting securities-fraud claims "relating to analyst research reports" into "nine lead actions").

The Honorable **A. Howard Matz** was a United States District Judge for the Central District of California from 1997 to 2013. He presided over MDL proceedings in *In re Conseco Life Insurance Co. Cost of Insurance Litigation*, MDL No. 1610; *see*, *e.g.*, 2005 U.S. Dist. LEXIS 45538 (C.D. Cal. May 31, 2005), and numerous other complex consolidated cases, including *Townsley v. Hydro International LLC*, No. 10-2212, 2010 U.S. Dist. LEXIS 90308 (C.D. Cal. Aug. 2, 2010); *Vizio, Inc. v. Funai Elec. Co.*, No. 09-0174, 2010 U.S. Dist. LEXIS 30850, at *1 (C.D. Cal. Feb. 3, 2010) ("coordinated patent litigation"); and *Klein v. Avis Rent a Car System Inc.*, No. 08-6059 *et al.*, 2009 U.S. Dist. LEXIS 34522 (C.D. Cal. Mar. 23, 2009) (consolidating eight putative class actions).

The Honorable **Michael B. Mukasey** was a United States District Judge for the Southern District of New York from 1988 through 2006, and Chief Judge from 2000 to 2006. After his retirement from the bench, from 2007 to 2009, Judge Mukasey served as the 81st Attorney General of the United States. As a District Judge, Judge Mukasey presided

over MDL proceedings in *In re Assicurazioni Generali S.P.A. Holocaust Era Insurance Litigation*, MDL No. 1374, 340 F. Supp. 2d 494, 496 (S.D.N.Y. 2004) ("twenty separate actions" alleging that defendant "failed to pay benefits following the death of the policy holders or damage to their property during the German campaign of genocide"); *In re Philip Services Corp. Securities Litigation*, MDL No. 1230; *see* 1998 U.S. Dist. LEXIS 8232 (J.P.M.L. June 2, 1998) (transferring thirteen securities actions); and *In re RJR Nabisco Securities Litigation*, MDL No. 818, No. 88-7905, 1992 U.S. Dist. LEXIS 12702 (S.D.N.Y. Aug. 24, 1992) (consolidated securities class actions). His experience in the MDL sphere also includes *In re United States Lines, Inc.*, No. 97-6727, 1998 U.S. Dist. LEXIS 10135, at *1-2 (S.D.N.Y. July 9, 1998) (bankruptcy appeal of claims brought by "15,000 merchant seamen" related to "multidistrict asbestos litigation" pending in the Eastern District of Pennsylvania; ordering claims transferred to MDL Court for pretrial management). Judge Mukasey has also presided over complex consolidated litigation outside the MDL context, *e.g.*, *In re Merrill Lynch Limited P'ships Litig.*, 7 F. Supp. 2d 256 (S.D.N.Y. 1997) (consolidated RICO claims), and entered the transfer order consolidating "more than 1,000 class actions . . . for pretrial purposes" in *In re Initial Public Offering Securities Litigation*, 174 F. Supp. 2d 70, 72 (S.D.N.Y. 2001).

The Honorable **Stephen M. Orlofsky** was a United States District Judge for the District of New Jersey from 1996 to 2003 and a Magistrate Judge of that Court from 1976 to 1980. Following his resignation from the bench, Judge Orlofsky served as a Special Master, issuing over a dozen substantive

opinions on consolidated multidistrict antitrust- and patent-related claims, in *In re K-Dur Antitrust Litigation*, MDL No. 1419; *see*, *e.g.*, No. 01-1652, 2007 U.S. Dist. LEXIS 97509 (D.N.J. Sept. 25, 2007). As a District Judge, Judge Orlofsky handled such complex consolidated cases as *In re Bayside Prison Litigation*, 190 F. Supp. 2d 755, 756 (D.N.J. 2002) (consolidated cases with "hundreds of constantly evolving Plaintiffs"), and *In re Consolidated Parlodel Litigation*, 22 F. Supp. 2d 320, 321 (D.N.J. 1998) ("fourteen products liability actions" consolidated for pretrial purposes).

The Honorable **James Robertson** was a United States District Judge for the District of Columbia from 1994 to 2010. He presided over *In re Department of Veterans Affairs (VA) Data Theft Litigation*, MDL No. 1796, *see* 653 F. Supp. 2d 58 (D.D.C. 2009), and other complex consolidated cases such as *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Norton*, 527 F. Supp. 2d 130, 133-34 (D.D.C. 2007) ("limited consolidation" of "37 tribal lawsuits"); *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007); and *Twin Cities Bakery Workers Health & Welfare Fund v. Biovail Corp.*, No. 01-2197 *et al.*, 2005 U.S. Dist. LEXIS 5570 (D.D.C. Mar. 31, 2005).

SUMMARY OF ARGUMENT

This case requires a judgment about when one case in a set of consolidated cases, especially an MDL, is sufficiently separate to justify an immediate appeal without waiting for final judgment in any other cases from the MDL. The *amici* submit this brief to share the experience that they and their

fellow District Judges have in making exactly that judgment.

Proximity, personal contact, and regular attention make District Judges more familiar with a consolidated litigation than anyone else. Their familiarity places them in the best position to judge how the pieces fit together—including which pieces may constructively be dispatched to the Court of Appeals for early, interlocutory resolution, and which should await further developments in the District Court. That is why this Court has entrusted District Judges with the role of "dispatcher" under Rule 54(b), "determin[ing] the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *Curtiss-Wright Corp. v. GE*, 446 U.S. 1, 8 (1980); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956). The analysis is no different in an action that consolidates multiple cases.

If anything, in complex litigation like this, the role of the dispatcher is even *more* important. MDLs are incredibly complex and challenging to manage. Giving each individual litigant sole control of appellate timing risks creating delays and dilemmas for the District Judge and the other litigants. Progress with discovery, summary judgment, and trial may be slowed while everyone waits for the Court of Appeals to resolve an unrepresentative appeal that should never have been made the test case. Indeed, the premature trip to the Court of Appeals may pretermit the District Court from reaching a thorough and comprehensive resolution of a common legal issue in a way that takes account of all member cases in the MDL.

Applying Rule 54(b) in this context promotes sound judicial administration. Holding that

individual litigants in a consolidated case can *always* appeal, or can *never* appeal, would necessarily overlook the case-specific considerations that may make some interlocutory appeals worthwhile and others counterproductive. But with District Judges performing the job of dispatcher under Rule 54(b), there is an easily understood rule (a certificate is required for an appeal) that allows an on-the-ground decisionmaker to take into account exactly those case-specific considerations.

In short, District Judges already make sound judgments about when a constituent part of an MDL is ready to go up on appeal. In deciding this case, this Court's interpretation of the jurisdictional statutes should be fully informed by District Judges' gatekeeping experience.

ARGUMENT

The Court granted *certiorari* to decide when a litigant may appeal the dismissal of one case among a set of cases consolidated in an MDL, while the rest of the cases remain pending in the District Court. Answering that question requires this Court to decide *who shall decide* that an individual case is fit for appeal. Does the District Judge make that judgment, by granting a certification "expressly determin[ing] that there is no just reason for delay," pursuant to FED. R. CIV. P. 54(b)? Does the Court of Appeals make the judgment, by looking at the paper record of proceedings in the District Court and assessing whether the proceedings were more consolidated than separate? Or does each litigant decide the matter for itself, under a *per se* rule that every case that began with a separate complaint may proceed as a separate appeal?

As former federal District Judges who have presided over MDLs (and, in the case of Judges Bechtle, Furgeson, and Jones, served on the Judicial Panel on Multidistrict Litigation), the *amici curiae* do not seek to opine on the proper legal interpretation of the jurisdictional statute, the MDL statute, or Rule 54(b). Rather, the *amici curiae* seek to demonstrate that whether an immediate appeal in one but not all consolidated cases is "desirable" (Pet. Br. 29) cannot be determined by a blanket rule, but instead will depend on the circumstances of each case. Weighing those individual circumstances should be done by the presiding District Judge, who is in the best position to evaluate whether an immediate appeal will help or hinder the coordination of the MDL.

I. The District Court is in the best position to assess the desirability of a single appeal from a consolidated case.

Through its rulemaking power, this Court has made the District Court the "dispatcher"—the body with authority to decide when a particular claim is ready to be sent on to the Court of Appeals while the remainder of the litigation remains behind in the District Court. *Curtiss-Wright Corp. v. GE*, 446 U.S. 1, 8 (1980); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956). As this Court recognized, the District Court is uniquely well-situated to make the discretionary determination whether a judgment disposing of just some of the claims warrants an appeal while other claims remain pending. The District Court performs the same role, just as readily, whether the claims are all presented in a single complaint or in multiple complaints consolidated for decision. District Courts carefully

and thoroughly carry out their responsibility under Rule 54(b), allowing appeals to proceed when circumstances warrant, but protecting the judicial system by disallowing immediate appeals when they would squander scarce judicial resources or hinder the resolution of claims still pending before them.

A. This Court has repeatedly emphasized the District Court's superior vantage point.

In its cases considering Rule 54(b), this Court has repeatedly returned to the District Judge's essential role under that Rule: promoting "sound judicial administration" by making the discretionary, case-sensitive judgment about whether a claim is ready for appeal. *Sears*, 351 U.S. at 437. Although the Rule embodies a "flexibl[e]" approach to appeals of fewer than all claims, the authority to use that flexibility rests with the District Judge, not the litigants. "[T]he District Court is used as a 'dispatcher,'" *id.* at 435: it "determine[s] the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *Curtiss-Wright*, 446 U.S. at 8. If one or more claims are ready for appellate review, the District Court then exercises its "sound judicial discretion" to "release [those claims] for appeal." *Id.*; *Sears*, 351 U.S. at 437. Because of that degree of "judicial supervision," Rule 54(b) "preserves the historic federal policy against piecemeal appeals." *Sears*, 351 U.S. at 438.

That discretionary judgment rests squarely with the District Judge, because the judgment rests on an understanding of how the pieces of the litigation fit together. The trial judge "is 'the one most likely to be familiar with the case,'" and that familiarity allows him or her to consider "all the facets of a case" before

deciding whether one or more claims are ready to be dispatched to the Court of Appeals. *Curtiss-Wright*, 446 U.S. at 10, 12 (quoting *Sears*, 351 U.S. at 437).

That is why, unlike some other forms of permissive appellate review, Rule 54(b) does not give the Court of Appeals power to decline appeals. *Compare* FED. R. CIV. P. 54(b) (decision made by District Court only), *with* 28 U.S.C. § 1292(b) (decision made by District Court *and* Court of Appeals), *and* FED. R. CIV. P. 23(f) (decision made by Court of Appeals only). Rather, if the basic requisites of Rule 54(b) are met—a final judgment on one or more individual claims, *see Curtiss-Wright*, 446 U.S. at 7—then the District Court's judgment that there is no just reason for delaying appeal is reviewed highly deferentially. *Id.* at 10 ("The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable.").

Although this Court has deliberately refrained from imposing "narrow guidelines for the district courts to follow," *Curtiss-Wright*, 446 U.S. at 11, some considerations are now well-established as part of the analysis. Thus, for instance, District Courts are entirely justified in considering whether the "appellate court would have to decide the same issues more than once," in separate appeals from different claims resolved at different times. *Curtiss-Wright*, 446 U.S. at 8. To be sure, even when there *is* such a possibility of duplicative appeals, "a sufficiently important reason" can still justify an immediate appeal—for example, if "an appellate resolution of the certified claims would facilitate a settlement of the remainder of the claims." *Id.* at 8 n.2. Those are matters to which the District Court is

uniquely attuned. Conversely, when "[t]he basis of liability" for the claims to be appealed is "clearly independent" of the claims still before the District Court, *Sears*, 351 U.S. at 437 & n.9, certification is within the District Court's broad discretion.

The District Court's "intimate knowledge" of the case, *Curtiss-Wright*, 446 U.S. at 12, and the case-specific factors weighing for or against appeal take on heightened importance in the context of complex consolidated litigation. Although neither *Sears* nor *Curtiss-Wright* involved consolidated cases, their reasoning is equally compelling in this context and has been invoked by multiple Courts of Appeals in ruling that a District Court judgment "dispos[ing] of only one of two consolidated cases . . . is not appealable under 28 U.S.C. § 1291 absent a Rule 54(b) certification." *Huene v. United States*, 743 F.2d 703, 703 (9th Cir. 1984). *Huene* stated that such a rule "leave[s] the discretion with the court which is best able to evaluate the [e]ffect of an interim appeal on the parties and on the expeditious resolution of the entire action" and "best able to assess the original purpose of the consolidation and whether an interim appeal would frustrate that purpose." *Id.* at 705. The Second, Tenth, and Federal Circuits have adopted similar rules, with the same rationale.[2]

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[2] *See Trinity Broadcasting Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987) (declining to "make[] the appellate court the arbiter of the nature and purpose of consolidation, rather than the district court"); *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988) ("agree[ing] that a district court is better able than an appellate court to decide whether an interim appeal in a consolidated action is appropriate because the district court is already familiar with the purpose and type of consolidation"); *Spraytex Inc. v. DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996).

B. District Court rulings on Rule 54(b) certifications in consolidated actions reflect their intimate familiarity with the circumstances weighing for or against appeal.

In a widely-cited opinion, the Third Circuit has collected the factors typically cited by District Courts in deciding whether to issue Rule 54(b) certifications:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Allis-Chalmers Corp. v. Phila. Elec. Co., 521 F.2d 360, 364 (3d Cir. 1975) (footnotes omitted).[3] District Courts have evaluated these same factors in deciding

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Some Circuits have adopted contrary rules or rules attempting to stake out some middle ground. *See Trinity*, 827 F.2d at 675 (collecting cases).

[3] In practice, the first and third factors tend to overlap, as a close relationship between adjudicated and unadjudicated claims naturally correlates with a likelihood that separate appeals will require the Court of Appeals to consider the same issues more than once.

whether to certify one among several consolidated cases for appeal.[4] As their written decisions reflect, District Courts give careful consideration to these factors: they grant Rule 54(b) certifications when the circumstances warrant, but they may justifiably deny certification when an immediate appeal would burden the Courts of Appeals with piecemeal appeals or disrupt the District Court's resolution of the remaining claims.

1. *Similarity of issues and the prospect of piecemeal appeals.* — Whether an immediate appeal will overlap with the issues that remain pending in the District Court is a key factor—often the primary one—that District Courts consider in deciding whether to issue a Rule 54(b) certification. Neither the Court of Appeals nor the District Court benefits when an appeal splinters off the main body of the litigation, but the same issue remains pending in the District Court. First, the task before the District Court becomes more complex, because the court must balance the prospect of guidance from the Court of Appeals (which may come a year later, or never) against the need to keep the litigation moving. Either path can lead to wasted effort. Second, and relatedly, the result may be seriatim

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[4] *See, e.g.*, *GMAC Mortg., LLC v. Flick Mortg. Investors*, Inc., No. 09-0125, 2012 U.S. Dist. LEXIS 45989, at *9-17 (W.D.N.C. Mar. 31, 2012) (citing *Allis-Chalmers* factors in assessing request for Rule 54(b) certification for one of multiple consolidated cases); *Ctr. for Individual Freedom, Inc. v. Ireland*, No. 08-0190 et al., 2009 U.S. Dist. LEXIS 30831, *13-16 & n.2 (S.D. W. Va. Apr. 9, 2009) (same); *De Aguilar v. Nat'l R.R. Passenger Corp.*, No. 02-6527, 2006 U.S. Dist. LEXIS 11187, at *6-7 (E.D. Cal. Mar. 2, 2006) (same); *Genty v. Gloucester*, 736 F. Supp. 2d 1322, 1328 (D.N.J. 1990) (same).

appeals. Because individual cases may be similar but distinguishable, allowing each individual litigant to appeal as of right risks asking the Court of Appeals to adjudicate similar and related claims repeatedly.

Appellate courts "cannot afford the luxury of reviewing the same set of facts in a routine case more than once without a seriously important reason." *Wood v. GCC Bend, LLC*, 422 F.3d 873, 882 (9th Cir. 2005). Courts thus deny Rule 54(b) certifications when allowing an immediate appeal will "force the [Court of Appeals] to revisit facts, claims, or legal theories more than once." *DeFazio v. Hollister, Inc.*, No. 04-1358 *et al.*, 2008 U.S. Dist. LEXIS 3856, at *9 (E.D. Cal. Jan. 7, 2008) ("Plaintiffs have asserted claims against the remaining defendants, similar to those claims which the court has dismissed, arising out of the same facts and based on similar legal theories. . . . Once the remaining claims are resolved, there is a substantial likelihood that the non-prevailing parties will again appeal. . . .").

But when the circumstances of particular cases are such that an immediate appeal may advance the litigation without likely bringing the same issues to the Court of Appeals again, District Courts exercise their discretion to grant Rule 54(b) certifications. *See*, *e.g.*, *In re Mass. Helicopter Airlines, Inc.*, 469 F.2d 439, 442-43 (1st Cir. 1972) (District Court reasonably granted Rule 54(b) certification because "the duty which forms the basis of any negligence action may well be different" from case to case); *Genty*, 736 F. Supp. at 1329-30 (granting certification in one case where "the defendants are entirely different parties" and "[t]he theories of liability in the two actions are different," while denying

certification in two other cases which "d[id] not presently stand in a posture warranting the entry of final judgment").

Ascertaining which scenario is more likely in any particular case is a highly case-specific judgment requiring thorough familiarity with the litigation. For instance, in *Rajala v. Gardner*, No. 09-2482, 2012 U.S. Dist. LEXIS 64067 (D. Kan. May 8, 2012), the District Court denied a Rule 54(b) certification in a case consolidated with another still-pending action, finding that the other case would likely result in another appeal and that "it would be better for the case to proceed to the Tenth Circuit at one time." *Id.* at *14. The Court's evaluation of those two possible scenarios was highly case-specific (*see id.* at *13), as will frequently be the case.

2. *Prospect that future proceedings in the District Court will obviate the need for appeal.* — Final decisions are appealable and tentative ones are not, because a District Court's refinement or reconsideration of a decision can eliminate the need for an appeal. One of the reasons Rule 54(b) requires a certification from the District Court is that until entry of a final judgment, "any order or other decision, however designated, . . . may be revised at any time." FED. R. CIV. P. 54(b). And that sort of revision is not uncommon in consolidated litigation. District Courts *do* recognize certain circumstances in which their own case-dispositive orders may warrant revision, and they reasonably deny certification when that prospect is real. In so doing, they save the Court of Appeals from having to decide what may be essentially an appeal from a tentative ruling. For example, in *In re Blech Sec.*

Litig., No. 94-7696, 1997 U.S. Dist. LEXIS 404 (S.D.N.Y. Jan. 16, 1997), the District Court noted:

> In this case, the claims against the Issuer Defendants are sufficiently intertwined with those against the remaining defendants that immediate appeal is inappropriate. The Section 10(b) and fraud claims that were dismissed as against the Issuer Defendants are still being litigated against the remaining defendants. . . . Additional evidence acquired in the course of discovery in the action against the remaining defendants could lead this court to modify its dismissal to permit repleading against the Issuer Defendants; such modification of an order is expressly permitted by Rule 54(b).

Id. at *6-7.

3. *Other factors.* — An inherent feature of consolidated cases is that multiple parties—often represented by different counsel—assert similar claims based on similar legal theories and the same underlying facts. The result is that appellate review in one case may result in a ruling binding on others. Separate and apart from whether that is an efficient use of appellate judicial resources—a determination, as discussed above, that is likely to vary from case to case—that reality also has serious ramifications on the litigants themselves. If the first plaintiff to have its claims dismissed in a consolidated case could bring an immediate appeal as of right, that invites "a scenario in which the [Court of Appeals] considers issues in the [other plaintiffs'] case, without the [other] plaintiffs being involved." *Winnett v. Caterpillar Inc.*, No. 06-0235 *et al.*, 2011 U.S. Dist. LEXIS 68407, at *19 (M.D. Tenn. June 24, 2011).

By contrast, a party's interest in participating in proceedings likely to affect its interests may sometimes cut in the other direction. In one illustrative case, the District Court granted a Rule 54(b) certification because ending the litigation without the intervening appeal "would place the Intervenor Defendants in the precarious situation, in the event of a successful appeal . . . , of being liable for an award of attorney's fees without having defended the merits of the case." *Ctr. for Individual Freedom*, 2009 U.S. Dist. LEXIS 30831, at *14. Ultimately, whether these considerations cut in favor of or against an immediate appeal is a case-sensitive question, not a categorical one. The District Court presiding over each case is in the best position to decide it.

II. District Court discretion to assess justifiable reasons for delay takes on particular importance in the MDL context.

The more complex the case, the more important the District Court's "dispatcher" function becomes. As complexity increases, it is even less likely that anyone else can rival the District Court's knowledge of the facts and circumstances. Even more clearly than in run-of-the-mill cases, the District Court is the one "most likely to be familiar with the case" and all of the competing factors weighing in favor of, or against, an immediate appeal. *Sears*, 351 U.S. at 437; *Curtiss-Wright*, 446 U.S. at 10.

And some of the most complex cases of all are MDLs. "Handling one (or more) of these difficult groups of cases is perhaps the greatest challenge that could be thrust upon a federal judge." Hon. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2243-44 (2008). MDL

transferee Judges are given wide discretion to coordinate and consolidate cases in the manner most effective for advancing the litigation—and part of that includes the discretion they exercise in determining when the component parts are ready for appellate review. Just as significantly, the manner in which cases are consolidated or coordinated in an MDL can take many different forms, can change on the fly as necessary to promote the efficient resolution of the MDL as a whole, and may be difficult to discern from the docket entries alone. All of these factors support the view that determining when a constituent case in consolidated MDL proceedings is ripe for appeal is, and should be, highly discretionary, and the District Judge presiding over the MDL is in the best position to exercise that discretion effectively.

A. The considerations relevant to the Rule 54(b) analysis are even more nuanced in MDL consolidations.

District Courts overseeing MDLs frequently issue orders that dispose of entire constituent actions that are consolidated with others, as petitioners' case was here. If no Rule 54(b) certification were necessary to take an appeal in that context, litigants would have no reason to seek them and courts would have no reason to grant or deny them. But litigants do, in fact, seek them, and MDL courts do, in fact, frequently grant them. Those courts use the same kind of case-sensitive analysis as in other consolidated cases. If anything, the scale and complexity of consolidated MDLs and the issues they present make it even more important in the MDL context to place the decision in the hands of a judicial officer who can weigh those considerations.

1. ***Similarity of cases and the prospect of piecemeal appeals.*** — Piecemeal appeals are at least as great a risk in the MDL context as in other consolidations. MDLs are established precisely because every constituent case presents at least one common issue (though frequently there are significant differences among the actions as well). 28 U.S.C. § 1407. District Courts overseeing MDLs are well-positioned to assess when a Rule 54(b) certification is unlikely to result in inefficient, duplicative appeals, and in such cases they grant certification.

For example, the District Court in *In re South African Apartheid Litigation*, No. 02-1499, 2009 WL 3364035 (S.D.N.Y. Oct. 19, 2009), found "no just reason for delay" of an appeal in an "action . . . consolidated with other actions," because the claims to be certified for appeal were "based on distinct allegations" and thus "separable from the claims against the remaining defendants." *Id.* at *1. They therefore "could be decided independently from the other claims." *Id.* The Court noted that the interest in "helping to avoid piecemeal appeals" weighed in favor of a Rule 54(b) certification because other parties were already seeking appellate review and certification offered "the opportunity to have the[] appeal heard roughly simultaneously with the pending appeal." *Id.*; *see also*, *e.g.*, *In re Mortg. Elec. Reg. Sys. (MERS) Litig.*, No. 09-2119, 2011 WL 4550189, at *12 (D. Ariz. Oct. 3, 2011) (finding "no just reason to delay the appeal" of an order dismissing 72 member cases, even though "several member cases remain[ed]") (quoting *Curtiss-Wright*, 446 U.S. at 8).

Conversely, MDL courts consciously avoid dispatching a part of the litigation to the Court of Appeals when the contemplated appeal is likely to be the first of many on the same issue. *See*, *e.g.*, *In re Refrigerant Compressors Antitrust Litig.*, No. 09-2042, 2013 U.S. Dist. LEXIS 109410, at *24-27 (E.D. Mich. Aug. 5, 2013) (Rule 54(b) certification not warranted because "the adjudicated and pending claims are closely related and stem from the same factual allegations," thus should "be confronted by the appellate court in a unified package").

The sheer number of cases in an MDL that may present similar—but not quite identical—claims results in situations where MDL courts adjudicate such claims serially and develop their legal analysis incrementally from case to case. For example, *In re Vioxx Products Liability Litigation*, MDL No. 1657, contained "cases transferred from every State in the Union," conceivably presenting the District Court "with the task of applying each state's statute of limitations in this multidistrict litigation." *In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897, 902 (E.D. La. 2007). The District Court regarded that as "a daunting task and one not to be undertaken until the litigation had matured," 522 F. Supp. 2d 799, 801 (E.D. La. 2007), and thus the former decision addressed the limitations issue with respect to "only three cases." 478 F. Supp. 2d at 902. In future rulings, the Court performed similar inquiries into the applicable statute of limitations and related tolling and concealment doctrines for other cases and other states. *E.g.*, *Roach v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, No. 10-0868, 2012 U.S. Dist. LEXIS 77613, at *9-13 (E.D. La. June 5, 2012) (addressing Illinois statute of limitations and

discovery rule). But while such an iterative approach may be highly effective for managing the MDL at the District Court level, it is not necessarily effective for managing the inevitable appeals. If each constituent action could be appealed as of right every time the District Court dismissed a claim as time-barred, different panels of the Court of Appeals would be required to acquaint themselves with a complex factual landscape only to perform a legal analysis with substantial (but not complete) overlap from case to case—for example, adjudicating a claim subject to a two-year state statute of limitations in one case and an otherwise identical claim subject to a three-year statute of limitations in another.

Furthermore, premature appeals affect District Judges' ability to manage their docket even more significantly in the context of MDLs. *See* Resps.' Br. 45-48. MDLs are challenging enough as it is. Adding the further complication of staying portions of discovery, consideration of individual claims, or both would make them significantly more difficult to manage—and significantly more difficult to shepherd towards a final resolution or settlement.[5] Yet that

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[5] Judges presiding over MDLs often take a more active role than usual in guiding cases to settlement by, for example, "select[ing] particular plaintiffs' cases whose trials will furnish data that may facilitate settlement of the remaining cases." *Bell v. Keystone RV Comp. (In re FEMA Trailer Formaldahyde Prods. Liab. Litig.)*, 628 F.3d 157, 160 (5th Cir. 2010); *see also*, *e.g.*, *In re Nineteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 605 (1st Cir. 1992) (MDL Judge "determined that the plaintiffs should try twelve representative claims as a means of facilitating settlement"). In the *Vioxx* MDL, after just "six bellwether trials," the parties achieved a settlement of "over 99% of the individual cases" amounting to some $4.35 billion. *In re Vioxx Prods. Liab. Litig.*,

would be the result of allowing constituent cases to go up on appeal, *as of right*, even when closely related issues remain pending in the MDL court.

Just as discussed above in the context of consolidated cases, *supra* Part I.B, there are often strong reasons why all the litigants raising a particular claim should be heard by the Court of Appeals at the same time. The District Court is in the best position to judge whether (for example) the first constituent case to be dismissed is a poor bellwether. The Courts of Appeals, the other litigants, and judicial administration more generally are better served by allowing the District Court to make that judgment.

2. *Prospect that future proceedings in the District Court will obviate the need for appeal.* — The need to separate final decisions from tentative ones—in which further proceedings in the District Court may negate the need for an appeal or alter the landscape with which the appellate court must contend—applies with extra force in the MDL context. District Courts handling MDLs may well have reason to revisit their prior determinations—especially because MDLs often contain numerous different sets of litigants on each side of the "v.," each of them able to add new arguments and new factual permutations. Before considering an issue wrapped up for purposes of the entire MDL, a District Court is entirely justified in revisiting earlier rulings to

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2014 U.S. Dist. LEXIS 397, at *4 (E.D. La. Jan. 3, 2014). But a Court cannot effectively advance cases to that point if pending appeals continually threaten to alter the landscape of the cases still before it.

harmonize them with the lessons learned from the other constituent cases in the MDL.

For example, *In re Countrywide Mortgage-Backed Securities Litigation*, MDL No. 2265, includes a series of cases in which plaintiffs argue their claims are timely because the applicable statute of limitations was tolled by the filing of an earlier class-action complaint in state court. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (establishing the class-action tolling doctrine). In an early ruling in the MDL, the District Court agreed with the defendants that *American Pipe* tolling did not apply and thus dismissed the plaintiffs' claims as time-barred, but it rejected the defendants' argument that a class action filed in a state court can *never* trigger the tolling doctrine. See *Me. State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1166 (C.D. Cal. 2010). Two years later, in another proceeding in the MDL, the Court stated, "Upon closer review, the Court is no longer convinced that this conclusion was correct," and announced "a change in the Court's analysis of existing case law." *FDIC as Receiver for Strategic Capital Bank v. Countrywide Fin. Corp.*, No. 12-4354, 2012 U.S. Dist. LEXIS 167696, at *41 (C.D. Cal. Nov. 21, 2012). If an immediate appeal had been taken from the 2010 *Maine State* dismissal, it may have been rendered entirely moot by the 2012 *Strategic Capital Bank* decision dismissing analogous claims on alternative grounds. Requiring parties to obtain a Rule 54(b) certification to take such an appeal ensures that the District Court itself has determined that the case has reached the point that the issues presented are not subject to being revisited in a future proceeding.

The Court actually overseeing the MDL obviously knows better than anyone else whether it may consider "revis[ing]" one of its orders later in the litigation. FED. R. CIV. P. 54(b). Once courts are satisfied that they are finished, they can and do issue Rule 54(b) certifications. *See*, *e.g.*, *Brown v. Am. Home Prods. Corp. (In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.)*, No. 99-20593, 2008 WL 2890878, at *1 (E.D. Pa. July 21, 2008) (granting certification because the court "d[id] not intend to revisit the awards [it had] made" and "[t]he vast majority of the work in connection with the Settlement Agreement and the MDL ha[d] concluded").

Relatedly, sometimes the direction in which a litigation is likely to go is so uncertain that the District Court leaves open the option of revising its decision on the Rule 54(b) certificate *itself*. *See*, *e.g.*, *In re Fresh & Process Potatoes Antitrust Litig.*, No. 10-2186, 2012 WL 1288752, at *2 (D. Idaho Apr. 16, 2012) ("The Court cannot predict precisely how this litigation will develop, but it may be that future developments would cause the Court to reconsider its position as to Dole's request for Rule 54(b) certification."); *In re Wash. Mut., Inc. Sec., Deriv., & ERISA Litig.*, No. 08-1919, 2010 WL 148126, at *2 (W.D. Wash. Jan. 11, 2010) (denying Rule 54(b) certification "without prejudice to bring[ing] a renewed motion after the Court rules on class certification"). Because the conditions that make an MDL decision appropriate, or inappropriate, for appeal are so fluid, any *per se* rule that removes the District Judge's assessment from the equation is particularly inappropriate in this context.

B. Deference to District Court discretion over appeals in constituent cases promotes the efficient administration of MDLs.

"[M]ultidistrict litigation is a special breed of complex litigation where the whole is bigger than the sum of its parts. The district court needs to have broad discretion to administer the proceeding as a whole, which necessarily includes keeping the parts in line." *Allen v. Bayer Corp. (In re Phenylpropanolamine (PPA) Prods. Liab. Litig.)*, 460 F.3d 1217, 1232 (9th Cir. 2006). "For it all to work, multidistrict litigation assumes macro-, rather than micro-, judicial management because otherwise, it would be an impossible task for a single district judge to accomplish." *Id.* at 1231. Deference to the District Court's discretion as to whether separate appeals from constituent cases will indeed "keep[] the parts in line" is vital for ensuring the efficient administration of MDLs, while an alternative rule that permits litigants themselves effectively to un-consolidate cases for appeal is fundamentally contrary to the "macro"-level management the MDL process contemplates. It is also contrary to "a key principle of the multi-district scheme," "the accrual of judicial expertise." *Kinley Corp. v. Integrated Resources Equity Corp. (In re Integrated Resources, Inc. Real Estate Limited P'ships Sec. Litig.)*, No. 92-4555, 1995 U.S. Dist. LEXIS 5181, at *11 (S.D.N.Y. Apr. 21, 1995).

In *In re FedEx Ground Package System, Inc. Employment Practices Litigation*, MDL No. 1700, 2011 U.S. Dist. LEXIS 107272 (J.P.M.L. Sept. 22, 2011), the Judicial Panel on Multidistrict Litigation had occasion to make the following observation in

refusing to review the legal correctness of a District Court's decision refusing to grant a Rule 54(b) certification in lieu of remand:

> There are sound reasons why this deference has proven so essential and successful over the many years of our experience; in most instances the transferee judge has an acute sense about the procedural steps necessary to advance the litigation in the fairest and most efficient way. Here, when Judge Miller suggested remand of these actions, he was in the best position to consider the relative efficiencies . . . .

Id. at *3. The parallels to this Court's statements in *Sears* and *Curtiss-Wright* are clear: the District Judge's ability to "explore all the facets of a case," *Curtiss-Wright*, 446 U.S. at 12, places it in the ideal position to evaluate "the procedural steps necessary to advance the litigation in the fairest and most efficient way." *FedEx*, 2011 U.S. Dist. LEXIS 107272, at *3.

This Court is nevertheless faced with the question whether the District Court's views on how to manage appeals from an MDL it is handling should be ignored, and its discretion eliminated. Petitioners believe that the answer is yes and that constituent cases in MDLs "maintain their individuality" (Pet. Br. at 20), even in the face of an explicit consolidation order from the District Judge presiding over the MDL. Pet. App. 10a-11a. *See generally* Jacqueline M. Gerson, *Comment: The Appealability of Partial Judgments in Consolidated Cases*, 57 U. CHI. L. REV. 169, 183 (1990) (noting that the per se rule treating each constituent case as though it were a separate, individual case "yields no

discretion to the courts" and "allow[s] litigants to 'un-consolidate' cases"). Without commenting definitively on the correctness or incorrectness of that position under the applicable statute, rules, and case law, the *amici curiae* respectfully submit that adopting that position will seriously hinder the ability of District Courts to "keep[] the parts [of an MDL] in line." *Allen*, 460 F.3d at 1232.

Similar problems would arise from the supposed middle-ground approach—a ruling that judgments in constituent cases in an MDL are appealable "on a case-by-case basis," depending on "the extent of consolidation." *Spraytex*, 96 F.3d at 1380. While this approach might appear to preserve the District Court's discretion to coordinate the parts of an MDL in the manner it sees fit, in practice the ultimate discretionary decision would be made by the Court of Appeals, not the District Court. And Courts of Appeals attempting to undertake that "case-by-case" analysis from a paper record, divorced from the District Judge's personal familiarity with the action, tend to find that the determination is no simple matter.[6]

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[6] *See generally* Gerson, 57 U. CHI. L. REV. at 186 ("Several problems inhere in relying on appeals courts to make case-by-case determinations of the desirability of appeals. First, a trial court is in a better position than an appeals court to evaluate the need for and consequences of an immediate appeal. The district court has first-hand knowledge of the claims, the parties, and the evidence; the appeals court only reviews a paper record. Since it consolidated the cases in the first place, the district court is also more familiar with the purpose of the consolidation, the overlap of issues, and the degree of consolidation. Hence, a district court is better positioned than an appellate court to assess the effects on the parties and the

The Eighth Circuit, for example, will not exercise jurisdiction over an appeal from one case in a consolidated action when there has been a "technical consolidation into a single action," but *will* exercise jurisdiction when "the consolidation is an arrangement for joint proceedings and hearings, for convenience." *Tri-State Hotels v. FDIC*, 79 F.3d 707, 711-12 (8th Cir. 1996) (quoting *Mendel v. Prod. Credit Ass'n of the Midlands*, 862 F.2d 180, 182 (8th Cir. 1988)) (brackets omitted). But that distinction is murky and difficult to apply. The result in *Tri-State Hotels* was that the Eighth Circuit was forced to divine the significance of particular indicia in the record—that "the district court did not clearly state whether the two lawsuits were formally merged for all purposes"; that "[w]hile the district court grouped both suits under a single docket number, this grouping appears to have been only to 'simplify the filing process'"; that the district court referred to the cases as "two suits"; and that "the district court termed [one of the suits] 'related litigation' rather than 'other matters in this case.'" *Id.* at 712. It is difficult to imagine how the Court of Appeals could have limned the precise contours of the consolidation intended by the District Court more reliably than the District Court itself.

Seeking to place the onus on the District Court, the Eighth Circuit ultimately remarked, with palpable exasperation:

> Our appellate consideration would be made considerably easier if the district court could regularly state on the record whether

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judicial system of allowing an early appeal.") (footnotes omitted).

> consolidated cases have been "formally merged, for all purposes," or whether the consolidation is "informal, for convenience only." Such a statement would provide a very useful bright line in this area.

Id. at 712 n.5. But a more useful (and equally clear) standard is the one that Rule 54(b) already contemplates. Treating individual judgments in consolidated cases as ripe for appeal *only* when the District Court expressly certifies them as such under Rule 54(b), based on its own firsthand knowledge of the nature and purpose of the consolidation, avoids the problem that frustrated the Eighth Circuit.

The inquiry the Eighth Circuit performed—just how consolidated are these cases?—is likely to be *especially* difficult and problematic in the MDL context, because MDL consolidations can take many different forms and change over time as the MDL evolves. Courts may also adjudicate cases in an effectively consolidated fashion without a formal consolidation order, because at the early stages of the MDL it may not yet be clear what type of consolidation the court will ultimately find appropriate. Alternatively, courts may find that small differences among cases in an MDL justify adjudicating some of them separately or incrementally without consolidating them formally. In such circumstances, the original order from the MDL Panel transferring the scheduled cases for "coordinated or consolidated pretrial proceedings" (28 U.S.C. § 1407(a)) may be the only formal consolidation order, but that itself should suffice to justify deference to the District Court as to how to manage the moving parts. *See*, *e.g.*, *Krys v. Sugrue (In re Refco Inc. Sec. Litig.)*, 859 F. Supp. 2d 644,

648-49 (S.D.N.Y. 2012) (rejecting argument "that without a formal consolidation order or joinder, the actions do not 'proceed as a single action,'" and stating that "[t]his MDL proceeding coordinates discovery and other pre-trial proceedings, and the actions in it are accordingly proceeding as a single action for numerous purposes.").

The purposes for which cases are consolidated in an MDL will differ from case to case and will evolve as the MDL itself evolves. No one is in a better position to assess those purposes than the District Judge. There is no need for a Court of Appeals to scour a paper docket to divine the nature of consolidation intended by the District Court, when it can simply take note of the presence or absence of a certified final judgment as the definitive indication whether the District Court has adjudged any of the component parts of the consolidated proceedings ready for review. That rule places the discretionary judgment exactly where it should reside: with the District Judge intimately familiar with the litigation and all of its component parts.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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