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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: WELDING ROD PRODUCTS LIABILITY LITIGATION	:	**Case No. 1:03-CV-17000** **(MDL Docket No. 1535)**
	:	**JUDGE O'MALLEY**
	:	**MEMORANDUM AND ORDER**

On April 21, 2004, this Court addressed certain motions to remand pending in a number of cases that have been consolidated in this Multi-District Litigation. See docket no. 224 ("Second Remand Order"). Among other conclusions, the Court found not well-taken arguments by plaintiffs in the "seven Louisiana cases" that there was no federal jurisdiction. Specifically, the Court determined that "at least one defendant in each of the seven Louisiana cases has stated a colorable federal defense and carried its burden of showing the propriety of federal officer removal. Accordingly, the motions to remand in these cases must all be denied." Id. at 23-24.

Shortly thereafter, the plaintiffs filed a motion for interlocutory appeal (docket no. 236), pursuant to 28 U.S.C. §1292(b). For the reasons stated below, this motion is **DENIED**.

Section 1292(b) provides that a district court may exercise its discretion to certify an Order for interlocutory appeal, but should do so only if the court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal

from the order may materially advance the ultimate termination of the litigation." The Sixth Circuit Court of Appeals has parsed this statutory language into three mandatory prerequisites, explaining that a district court may certify an interlocutory appeal "if the petitioner can show three elements: (1) a controlling legal question is involved; (2) there is 'substantial ground for difference of opinion regarding it; and (3) an immediate appeal would materially advance the litigation's ultimate termination." In re Baker & Getty Financial Services, Inc., 954 F.2d 1169, 1172 (6th Cir. 1992) (internal quotation marks omitted).

Further, because "Section 1292(b) is a departure from the normal rule that only final judgments are appealable, [it] must be construed narrowly." James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1068 (9th Cir. 2002); see Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc., 29 F.Supp.2d 825 (N.D. Ohio 1998) ("Section 1292(b) has a narrow scope: '[O]nly exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment'") (some internal quotation marks omitted). The statute is not meant to be a "vehicle to provide early review of difficult rulings in hard cases." In re NASDAQ Market Makers Antitrust Litig., 938 F. Supp. 232, 234 (S.D.N.Y. 1996) (quoting German v. Federal Home Loan Mortgage Corp., 896 F. Supp. 1385, 1398 (S.D.N.Y. 1995)). If a district court does chose to certify an order for interlocutory appeal, it remains within the discretion of the appellate court to permit the appeal. 28 U.S.C. §1292(b).

The defendants argue that the plaintiffs can show none of the three elements necessary for certification

of an interlocutory appeal. The Court finds the plaintiffs' argument is well-taken as to the third element.[1]

In another MDL case, In re NASDAQ, 938 F. Supp 232, the plaintiffs presented the district court with precisely the same issue as the plaintiffs present in this case – whether it was appropriate to certify for interlocutory appeal the denial of a motion for remand of certain cases. The court concluded certification was not appropriate, because the plaintiffs could not meet the third prerequisite:

> The principal difficulty with Plaintiffs' request for certification is that even if the Order [denying remand] is reversed on immediate appeal, that reversal is unlikely to "materially advance the termination of the litigation." While it is true that an immediate reversal of the Order would avoid putting these particular named Plaintiffs through continued proceedings in this Court on their alleged state-law claims, such a reversal would not expedite the termination of the In re NASDAQ litigation.

Id. at 234 (emphasis added). Put simply, "the NASDAQ litigation will continue before this Court whether or not these particular named Plaintiffs succeed on appeal." Id.

The same analysis applies in this case. In the context of an MDL, the third prerequisite asks the Court to determine whether appellate review would materially advance the ultimate termination of the entire litigation, not just the claims of the specific plaintiffs in the seven Louisiana cases. As in In re NASDAQ, this MDL will continue before this Court regardless of whether the plaintiffs in the seven Louisiana cases might succeed on an appeal of the Second Remand Order. Moreover, these plaintiffs "may well benefit from the economies of coordinated discovery and other pretrial proceedings conducted in [this MDL]. Since the Plaintiffs' state

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[1] Because the absence of even one element is fatal, the Court does not fully address the parties' arguments regarding the first and second elements. Having carefully read these arguments, however, the Court will note it disagrees with the plaintiffs' position that, in the Second Remand Order, the Court mis-perceived or mis-applied the controlling legal standard regarding the "causal nexus" element of federal officer removal. The Court re-examined its earlier analysis in light of plaintiffs' criticisms, but remains firm in both its reasoning and ultimate conclusion.

claims allege the same facts as the federal claims before this Court, the subject matter of the discovery will be essentially the same." Id. In other words, it is even possible that the ultimate termination of the seven Louisiana cases will be advanced by remaining in the MDL. Accordingly, the Court denies the plaintiffs' motion for interlocutory appeal.[2]

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

DATED: August 31, 2004

[2] The Court adds here that it has also examined In re TMI Litigation Cases Consol. II, 940 F.2d 832 (3rd Cir. 1991), cert. denied, 503 U.S. 906 (1992), not cited by the parties. In that case, the district court found it had no jurisdiction to entertain claims made by multiple plaintiffs stemming from the accident at the Three Mile Island nuclear facility, because Congress had exceeded its authority when it endowed federal courts with subject matter jurisdiction over public liability actions arising from nuclear incidents; accordingly, the district court remanded the cases to state court. Noting that appellate review of its ruling would likely "save the parties time and money" and avoid near-certain attempts by Congress to amend the statute, id. at 648, the district court then certified the remand order for interlocutory appeal. The Third Circuit accepted the appeal and vacated the remand order, holding the cases should proceed in federal court. Even though In re TMI involved numerous cases and plaintiffs, as does the instant litigation, this Court finds the circumstances in In re TMI are markedly different from those presented in this case. Despite some procedural similarities, In re TMI does not support the plaintiffs' position that interlocutory appeal is appropriate.

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