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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE  
(PPA) PRODUCTS LIABILITY  
LITIGATION,

MDL NO. 1407

CC: counsel: BTR

This document relates to:  
  
Johnson v. Bayer Corp., et al., No. C01-2050R  
  
King v. Bayer Corp., et al., No. C01-2049R  
  
Moore v. Bayer Corp., et al., No. C01-2058R  
  
Sparks, et al. v. Novartis Consumer Health Inc., et al., No. C02-910R

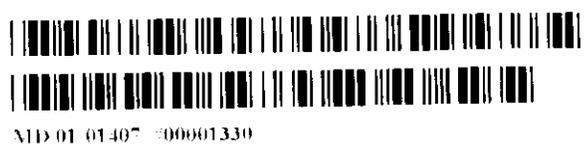
ORDER DENYING PLAINTIFFS' MOTION TO CERTIFY JUDGMENT FOR INTERLOCUTORY APPEAL

I. INTRODUCTION

Plaintiffs filed a motion pursuant to 28 U.S.C. § 1292(b) to certify for interlocutory appeal the orders denying plaintiffs' motions for remand issued by this court on October 25, 2002. Having reviewed the papers filed in support of and in opposition to this motion, the court rules as follows:

II. DISCUSSION

Section 1292(b) serves as a mechanism by which litigants can pursue an immediate appeal of a non-final order upon the consent



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1 of both the district court and the court of appeals.<sup>1</sup> A district  
2 court judge may certify that an order involves a "controlling  
3 question of law as to which there is substantial ground for  
4 difference of opinion and that an immediate appeal from the order  
5 may materially advance the ultimate termination of the litiga-  
6 tion[.]" 28 U.S.C. § 1292(b).

7 The court denied remand motions filed in these cases upon  
8 finding non-diverse defendants fraudulently joined. The court  
9 found "no reasonable basis for predicting that plaintiffs might  
10 establish liability" against the Louisiana pharmacies from whom  
11 plaintiffs purchased PPA-containing products. Badon v. RJR  
12 Nabisco, Inc., 224 F.3d 382, 393 (5th Cir. 2000). Specifically,  
13 the court found that these plaintiffs failed to plead the ele-  
14 ments of redhibition, La. Civ. Code art. 2520 et seq., that their  
15 claims were de minimis, and that no cause of action in redhibi-  
16 tion exists against pharmacies for the sale of medication.

17 Plaintiffs assert the controlling question of law to be  
18 whether the assertion of breach of warranty in redhibition  
19 against a non-diverse retailer constitutes fraudulent joinder in  
20 Louisiana. They point to Fifth Circuit case law, as well as  
21 Louisiana district court decisions in other PPA cases, as demon-  
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23 <sup>1</sup> Plaintiffs request that this court certify judgment to  
24 either the Ninth or Fifth Circuit Court of Appeals. The court  
25 clarifies that, in a multi-district litigation ("MDL"), appellate  
26 proceedings for early review of pretrial rulings lie in the court  
of appeals for the MDL court - in this case the Ninth Circuit.  
See, e.g., Utah v. American Pipe & Constr. Co., 316 F. Supp. 837,  
839-40 (C.D. Cal. 1970).

1 strating the existence of substantial grounds for a difference in  
2 opinion. See Badon v. RJR Nabisco, Inc., 236 F.3d 282, 284-87  
3 (5th Cir. 2000) (remanding case involving redhibition claims  
4 brought against non-diverse cigarette distributors); and Pls.'  
5 Mot. at 4-5 & n.2 (citing Louisiana district court decisions  
6 granting motions to remand in PPA cases based on the inclusion of  
7 redhibition and other claims against non-diverse retailers).<sup>2</sup>  
8 Plaintiffs assert that there will be a material advancement of  
9 the litigation in that remand will terminate these proceedings at  
10 the federal level.

11 However, the court does not believe grounds exist to  
12 certify these orders for interlocutory appeal. There must be  
13 "exceptional circumstances [to] justify departure from the basic  
14 policy of postponing appellate review until after the entry of  
15 final judgment.'" In re Cement Antitrust Litig., 673 F.2d 1020,  
16 1026 (9th Cir. 1982) (quoting Coopers & Lybrand v. Livesay, 437  
17 U.S. 463, 475 (1978)).<sup>3</sup> "While congress did not specifically  
18 define what it meant by 'controlling,' the legislative history of  
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21 <sup>2</sup>The judges granted the motions to remand before the cases  
22 could be transferred to this court as a part of the PPA MDL.  
23 Judges in the vast majority of PPA cases filed in Louisiana  
declined to issue any rulings pending transfer to this court.  
See Defs.' Opp'n at 5 & n.1.

24 <sup>3</sup>See also Caterpillar Inc. v. James David Lewis, 519 U.S.  
25 61, 74 (1996) ("Routine resort to 1292(b) requests would hardly  
26 comport with Congress' design to reserve interlocutory review for  
'exceptional' cases while generally retaining for the federal  
courts a firm final judgment rule.")

1 1292(b) indicates that this section was to be used only in  
2 exceptional situations in which allowing an interlocutory appeal  
3 would avoid protracted and expensive litigation." Id. As such,  
4 it must be shown that "resolution of the issue on appeal could  
5 materially affect the outcome of litigation in the district  
6 court." Id.

7 In denying the motions to remand, this court relied on  
8 Louisiana state and federal case law interpreting the redhibition  
9 statute and the issue of fraudulent joinder.<sup>4</sup> The court distin-  
10 guished the Fifth Circuit case plaintiffs point to in rehashing  
11 their argument in support of remand: "Badon provides little  
12 guidance [] because it involved the distribution of cigarettes  
13 rather than medication - prescription or otherwise. The liabil-  
14 ity limitations for pharmacies selling medications never became  
15 an issue. As described above, courts since Badon have continued  
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17 <sup>4</sup>See, e.g., Strickland v. Brown Morris Pharm., Inc., No. 96-  
18 815, 1996 WL 537736 at \*1-2 (E.D. La. Sept. 20, 1996) (citing  
19 redhibition statute and denying remand, in a suit including  
20 claims brought against a pharmacy for the sale of a non-  
21 prescription drug, because "in Louisiana a non-manufacturer  
22 seller of a defective product may be liable for damages only if  
23 he knew or should have known of the dangerous characteristic of  
24 the product" and because "a seller has no duty to inspect a  
25 product for inherent vices or defects prior to sale and has no  
26 duty to warn or instruct buyers on proper use."); and Badon, 236  
F.3d at 286 & n.4 ("Plaintiffs appear to argue that any mere  
theoretical possibility of recovery under local law - no matter  
how remote or fanciful - suffices to preclude removal. We reject  
this contention. As the cited authorities reflect, there must at  
least be arguably a reasonable basis for predicting that state  
law would allow recovery in order to preclude a finding of  
fraudulent joinder.")

1 to limit the liability of pharmacies." Johnson v. Bayer Corp.,  
2 et al., No. C01-2050R, slip op. at 8 n.3 (W.D. Wash. Oct. 25,  
3 2002) (citing Badon, 236 F.3d 282). The court's decisions were  
4 also fact sensitive, resting not only on a finding that  
5 redhibition claims could not lie against the pharmacies, but also  
6 on the fact that the plaintiffs failed to plead the elements of  
7 such a claim in the first place.<sup>5</sup> As such, none of the case law  
8 proffered by plaintiffs justifies the exceptional remedy of  
9 interlocutory review.

10 Moreover, while an immediate reversal would terminate the  
11 litigation of these particular cases in federal court, it would  
12 not materially affect the ongoing MDL. Rather, remand would  
13 "merely create parallel state proceedings on the same subject  
14 matter while the main federal action continues." In re NASDAO  
15 Market Makers Antitrust Litig., 938 F. Supp. 232, 234-35

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18 <sup>5</sup> Compare Johnson, slip op. at 4 & n.1 (complaint only cited  
19 bad faith redhibition provision and plaintiff conceded she did  
20 not allege cause of action against retailer as a bad-faith  
21 seller), with Coleman v. Bayer Corp., et al., No. 02-333, slip  
22 op. at 6 (E.D. La. Apr. 3, 2002) (plaintiffs specifically alleged  
23 retailer sold product in bad faith under redhibition act).  
24 Indeed, one of the Louisiana district court judges recognized the  
25 fact sensitive nature of these decisions in finding the  
26 defendants in those cases "objectively reasonable" in seeking  
removal: "Removals based on the ground of fraudulent joinder are  
fact sensitive. Rulings by the judge presiding over the [MDL]  
confirm the case sensitive nature of the PPA litigation regarding  
the non-diverse drug stores." Duplissis v. Bayer Corp., et al.,  
No. 02-0854, slip op. at 2-3 (E.D. La. May 16, 2002). See also  
Buckley v. Bayer Corp., et al., No. 02-1048, slip op. at 2-3  
(E.D. La. May 16, 2002) (same); Primas v. Bayer Corp., et al.,  
No. 02-674, slip op. at 3 (E.D. La. May 16, 2002) (same).

ORDER

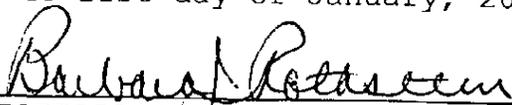
1 (S.D.N.Y. 1996) (immediate reversal on appeal would not materi-  
2 ally advance or expedite termination of NASDAQ MDL litigation).  
3 These circumstances do not constitute the exceptional situation  
4 accounted for in Section 1292(b). See id. ("Although Plaintiffs'  
5 inconvenience in litigating their claims in what they believe to  
6 be an inappropriate forum may be considered by the court, the  
7 institutional efficiency of the federal courts is among the  
8 primary concerns animating § 1292(b).")

9 Finally, plaintiffs mistakenly assert that, without remand,  
10 they will be unnecessarily burdened in litigating their cases  
11 thousands of miles from home. Plaintiffs' cases will be remanded  
12 to the transferor courts once pretrial matters are concluded, see  
13 28 U.S.C. § 1407(a) and Lexecon Inc. v. Milberg Weiss Bershad  
14 Hynes & Lerach, 523 U.S. 26 (1998), and all case-specific discov-  
15 ery will be conducted in plaintiffs' own districts.

16 III. CONCLUSION

17 For the reasons stated above, the court does not believe  
18 that the orders denying motions to remand in these cases qualify  
19 for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). As  
20 such, the court hereby DENIES plaintiffs' motion to certify  
21 judgment for interlocutory appeal.

22 DATED at Seattle, Washington this 21st day of January, 2003.

23   
24 BARBARA JACOBS ROTHSTEIN  
25 UNITED STATES DISTRICT JUDGE  
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