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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

<b>IN RE: WELDING ROD PRODUCTS LIABILITY LITIGATION</b>	:	:
	:	<b>Case No. 1:03-CV-17000</b>
	:	(MDL Docket No. 1535)
	:	(1:03-17003; 1:03-17119;
	:	1:03-17120; 1:03-17121;
	:	1:03-17122; 1:03-17123;
	:	1:03-17124; 1:03-17125;
	:	1:03-17126; 1:03-17127)
	:	:
	:	<b>JUDGE O'MALLEY</b>
	:	:
	:	<b><u>MEMORANDUM AND ORDER</u></b>
	:	:

For the reasons and to the extent stated below, the Court rules as follows on certain motions to remand pending in cases that have been consolidated in this Multi-District Litigation.

\* The motion to remand in Ruth v. Lincoln Electric Co., case no. 03-CV-17003 is **GRANTED**. The Ruth case is hereby **REMANDED** to the Circuit Court of the First Judicial District of Hinds County, Mississippi, where it was originally filed.<sup>1</sup>

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<sup>1</sup> When Ruth was originally filed, a number of unrelated individuals were joined as parties-plaintiff, even though their joinder was not authorized by the Federal Rules of Civil Procedure. Accordingly, the Court ordered that the case “be **severed** such that each plaintiff (together with their associated derivative claimants) becomes a plaintiff in a new lawsuit, to which a new case number will be assigned.” Ruth, Order at 2 (Nov. 20. 2003). Thus, the Court’s remand of Ruth to state court actually applies to **all the ten cases** listed in docket no. 5 of Ruth.

\* The Court **RESERVES RULING** on the motions to remand in Orr v. Lincoln Electric Co., case no. 03-CV-17037, Maples v. Lincoln Electric Co., case no. 03-CV-17038, and Acy v. Lincoln Electric Co., case no. 03-CV-17047. Specifically, the Court: (1) concludes the defendants did not timely file their original notices of removal in these cases, asserting federal defenses; (2) reserves ruling on whether the defendants timely filed their amended removal notices, asserting fraudulent joinder; and (3) reserves ruling on whether the defendants' fraudulent joinder arguments are well-taken on the merits.

\* The motions to remand filed in the 28 cases listed in the appendix at the end of this memorandum are **DENIED IN PART**; specifically, those motions are denied to the extent they assert remand is appropriate based on the defendants' failure to timely remove. In a separate Order, the Court will rule further on these 28 motions to remand, to the extent they assert lack of federal diversity jurisdiction.

#### I. General Background.

A number of plaintiffs around the country have filed lawsuits against various manufacturers, suppliers, and distributors of welding rod products, as well as related trade associations. The common theme of these lawsuits is that exposure to manganese contained in the fumes given off by these welding rods has caused physical harm to the plaintiffs, and that the defendants knew or should have known that use of the welding rods would cause these injuries. Several of these lawsuits were filed in or removed to federal district courts.

The plaintiffs in one of these federal cases filed a motion with the Federal Judicial Panel on Multi-District Litigation ("MDL Panel"), seeking to consolidate and centralize all related federal lawsuits, pursuant to 28 U.S.C. §1407. MDL docket no. 1535. On June 23, 2003, the MDL Panel granted the motion, consolidating and transferring all related pending federal litigation to the Northern District of Ohio and

assigning oversight of the MDL proceedings to the undersigned. As of December 4, 2003, pursuant to the entry of six conditional transfer orders, as well as the filing of related cases directly in this Court, there were pending well over 3,300 cases in this MDL.<sup>2</sup>

Many of the cases transferred to this Court from other federal district courts were originally filed in state courts, and then removed. In 54 of those removed cases, the plaintiffs filed motions to remand the action to the state court in which the case was originally filed. This Court ordered the parties to file “master briefs” addressing all of the issues raised in the different motions to remand. The Court then heard oral argument on these motions on November 25, 2003, and stated it would rule on common issues raised in the pending motions in “batches.” This Order addresses only certain procedural issues – that is, the failure of either the plaintiffs or the defendants to meet a procedural deadline – raised in 29 of the 54 cases. The Court will later issue other Orders addressing substantive issues, such as the merits of the arguments regarding fraudulent joinder and the federal officer defenses.

## II. Timeliness of Defendants’ Removal in Ruth.

The Court first addresses the pending remand motion in the case of Ruth v. Lincoln Electric Company, No. 03-CV-17003. Although the parties raise a plethora of issues in Ruth, the Court finds that one issue is dispositive – the timeliness (or lack thereof) of defendants’ removal.

The plaintiffs in Ruth filed their case in Mississippi state court on August 27, 2001. The defendants

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<sup>2</sup> Many of these 3,300 cases were originally filed as “mass” cases, grouping unrelated plaintiffs into a single action. These actions have been severed into multiple cases, consistent with the dictates of Fed. R. Civ. P. 21.

removed the action to federal court on April 24, 2002. The plaintiffs assert this removal was untimely, citing 28 U.S.C. §1446(b). This statute states:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. §1446(b).

Historically, courts have strictly construed the procedural requirements of §1446. See Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941) (“federal courts [must] scrupulously confine their own jurisdiction to the precise limits which the statute has defined”); Local Union No. 172 Int’l Ass’n of Bridge, Structural Ornamental and Reinforcing Ironworkers v. P.J. Dick Inc., 253 F. Supp.2d 1022, 1025 (S.D. Ohio 2003) (“strict compliance with the statute is required”). Plaintiffs point to the first sentence of §1446(b) and insist that, because the defendants removed the action to Mississippi federal district court more than 30 days after they received service of process,<sup>3</sup> the defendants did not comply with the statute and the case must be

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<sup>3</sup> Under 28 U.S.C. §1441(a), “all defendants who have been properly joined and served at the time the removal petition is filed must join in or consent to the removal of the case.” P.J. Dick Inc., 253 F. Supp.2d at 1024. It is not clear whether the defendants met this requirement in Ruth. Because the plaintiffs do not suggest otherwise, however, the Court assumes the defendants met this requirement when they filed their notice of removal. Further, because the defendants do not suggest otherwise, the Court assumes that all removing defendants had received service of process more than 30 days before they filed their notice of removal.

remanded.

The defendants respond by pointing to the second sentence of §1446(b), which extends the 30-day removal period in certain circumstances. The defendants explain that, on April 8, 2002, the plaintiffs produced a transcript of a deposition, taken in another case, of plaintiff Troy Smith; from this deposition the defendants learned that Smith had worked as a welder on “at least 24 U.S. Navy vessels.” The defendants assert that this transcript was the “first paper” they received from which they could ascertain that they had available certain defenses under federal law – specifically, the government contractor defense, and the Defense Production Act.<sup>4</sup> Defendants make this assertion even though the complaint alleges that Smith and other plaintiffs used the defendants’ welding rod products while employed at Ingalls Shipyard in Pascagoula, Mississippi – where (as defendants knew) ships were built pursuant to both private and government contracts.<sup>5</sup>

The Court finds that the defendants’ “first-paper” assertion is not well-taken; that is, their “excuse” for removing the case to federal court later than 30 days after service of process is not valid. Well before they

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<sup>4</sup> More specifically, the defendants assert that, pursuant to the government contract defense, they are entitled to remove the case under 28 U.S.C. § 1442(a)(1). This statute provides that the following entities may remove a case to federal court: “The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.” Separately, the Defense Production Act allows a government contractor to avoid certain liabilities by virtue of its status as government contractor. See Hercules Inc. v. United States, 516 U.S. 417 (1996) (discussing the government contractor defense and the Defense Production Act).

<sup>5</sup> As plaintiffs point out, moreover, defendants also make this assertion even though it was one of the lead counsel for defendants who took Smith’s deposition in the earlier case. Plaintiffs assert that Smith’s history was, thus, well known to at least some of the removing defendants long before plaintiffs produced Smith’s deposition in Ruth. The Court does not, however, charge the defendants with knowledge of the earlier case involving Smith; as noted below, defendants’ general knowledge of the activities at Ingalls Shipyard and their assertion of affirmative defenses apparently borne out of that knowledge was sufficient to trigger their right to remove this action to federal court.

sought removal, several of the defendants filed answers to the complaint specifically asserting the very same federally-based defenses they now assert they learned about only after receiving the Smith deposition. Defendant Hobart Brothers Company, for example, filed its answer on January 25, 2002, and included the following affirmative defense:

[T]he use by Plaintiff[s] of Defendant's products, if any, was in accordance with the requirements of the designs, plans, and specifications of the United States Navy or other governmental entities . . . . This Defendant cannot be held to be liable to the Plaintiffs for complying with the designs, plans, specifications, and requirements of the United States Navy or others under national defense procurement contracts and/or other government contracts for supplying materials for such contracts in accordance with their terms. Defendant specifically pleads the government contractor defense.

Answer, at 36<sup>th</sup> defense. Similarly, defendant Airgas-Gulf States, Inc. filed an answer on January 28, 2002, which included as its 31<sup>st</sup> defense the assertion that it was “acting as an agent/employee and/or government contractor of the United States Navy . . . such that [plaintiffs’ claims are] subject to and potentially barred by the terms of the Federal Tort Claims Act and/or the Government Contractor Defense.” Virtually every other removing defendant also filed answers including reference to the same defenses, and these answers were filed months before they received the Smith deposition.

The defendants argue that: (1) the assertion of the federal defenses in their answers was simply a “placeholder” mechanism, allowing them to rely upon the defense if and when they discovered that the facts supported it; (2) as soon as they learned that, in fact, there existed facts supporting assertion of the federal defenses, they removed the case; and (3) they did not want to remove the case earlier, until they were “sure” there existed a federal jurisdictional basis. The Court rejects this string of contentions, for two reasons.

First, the defendants were sure enough that there existed facts supporting their federal defenses to actually assert those defenses, pursuant to Rule 11 – which requires that, “to the best of the person’s

knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . the allegations and other factual contentions have evidentiary support.” The Smith deposition may have confirmed absolutely what the defendants already suspected, but the defendants certainly knew enough to allege facts supporting their federal defenses – which is why they pled them. Case law makes it clear that, to justify removal premised on the government contractor or federal officer defense, the defendants must assert the defense in their answer. See Mesa v. California, 489 U.S. 121, 133-34 (1989) (“an unbroken line of this Court’s decisions extending back nearly a century and a quarter have understood . . . the federal officer removal statute to require the averment of a federal defense”). The defendants need only supply an “allegation of a colorable federal defense” to obtain removal. Id. at 129 (emphasis added). In other words, the defendants do not need to have discovered facts supporting their federal defense before removal is allowed or appropriate, they need merely have reasonable information or belief that the federal defense is available. Having included in their answers a colorable federal defense allowing removal, the defendants cannot argue that removal was not proper until they later obtained “another paper” providing clear factual support for that defense.<sup>6</sup>

The second reason the Court rejects the defendants’ argument is that to accept it would be to blur dramatically the bright-line rule recited in §1446, which this Court must strictly construe. Under defendants’ theory of pleading and removal, it would be a routine matter for defendants to sidestep the definite deadline

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<sup>6</sup> The Court does not address in this opinion the parties’ substantive arguments regarding fraudulent joinder. It is worth noting, however, that, the defendants rely heavily on the admissions of co-defendants to support their fraudulent joinder removal arguments. It would seem that, if those admissions are meaningful, so too must be averments giving notice of federal defenses in the answers filed by co-defendants.

imposed by the statute. “Due regard for the rightful independence of state governments, which should actuate federal courts, requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined.” Healy v. Ratta, 292 U.S. 263, 270 (1934). The Court must reject the defendants’ suggestion that this Court should not be as scrupulous as the statute and comity requires.

In Ruth, even if some of the defendants did not have reason initially to know, simply by reading the complaint, that the case was removable because there existed a colorable federal defense, the answer filed by the first defendant to invoke such a defense gave all other removing defendants notice that the case was subject to federal jurisdiction. See Jernigan v. Ashland Oil Inc., 989 F.2d 812, 819 (5<sup>th</sup> Cir. 1993), cert. denied, 510 U.S. 868 (1993) (“[t]he thirty days is measured from receipt of whatever writing – in this case [co-defendant] Drilled Crossings’ answer – constitutes first notice” that the case is removable). There is no question but that the defendants filed their notice of removal well after the date that was 30 days after the point in time when they received service of an answer asserting a colorable federal defense and a basis for removal. Accordingly, the plaintiffs’ motion to remand the Ruth case, based on failure to timely remove, must be granted.

### III. Timeliness of Defendants’ Removal in Orr, Maples, and Acy.

Except for an additional complication, the analysis the Court set out above in Ruth applies equally to three other MDL cases: Orr v. Lincoln Electric Co., No. 03-CV-17037; Maples v. Lincoln Electric Co., No. 03-CV-17038; and Acy v. Lincoln Electric Co., No. 03-CV-17047. In each of these three cases: (1) the defendants filed their notice of removal well after the date that was 30 days after the point in time when they received service of an answer asserting a colorable federal defense and a basis for removal; and (2) the



plaintiffs filed a timely motion to remand. Except for the additional complication, the motions to remand filed in Orr, Maples, and Acy are well-taken for the same reasons the motion is well-taken in Ruth.

The additional complication in Orr, Maples, and Acy is that, in those cases, the defendants filed a “supplemental notice of removal,” asserting an additional basis for removal of the case from Mississippi state to federal district court.<sup>7</sup> The additional basis for removal stated in these supplemental notices was that the non-diverse defendants were fraudulently joined, and there existed complete diversity jurisdiction. The supplemental notices also explained why the defendants had not realized earlier that they could assert fraudulent joinder and remove the cases based on diversity jurisdiction – the defendants asserted they had just learned, via receipt of answers to requests for admissions from co-defendants, that there was no valid basis for the plaintiffs’ claims against the non-diverse defendants. The defendants asserted that these answers were presented in “another paper,” and therefore extended the 30-day deadline contained in 28 U.S.C. §1446(c).

This complication requires the Court to conduct a second, separate analysis of the timeliness of the defendants’ motions to remand in the Orr, Maples, and Acy cases. That is, although the Court has concluded that the defendants cannot rely on receipt of the Smith deposition to extend the 30-day removal deadline with respect to the federal officer defense asserted in the initial notices of removal in these cases, the Court may still have to determine whether the defendants’ receipt of admissions from their co-defendants extends the 30-day removal deadline with respect to the fraudulent joinder asserted in the supplemental notice of removal in

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<sup>7</sup> In the Acy case, the defendants filed their supplemental notice over five months after filing their initial removal notice, and four months after the plaintiffs had filed their motion to remand. In the Orr and Maples cases, the defendants filed their supplemental notice one week after filing their initial removal notice, and about two weeks before the plaintiffs filed their motion to remand.

these cases.<sup>8</sup>

Rather than undertake this additional timeliness analysis in this Order, however, the Court chooses to defer further examination of the Orr, Maples, and Acy cases. In addition to the procedural grounds for remand raised by plaintiffs in these three cases, plaintiffs also assert that federal diversity jurisdiction did not and does not exist in these three cases because the non-diverse defendants were not fraudulently joined. The Court will address this argument in a separate opinion. If this substantive argument does not resolve the question of whether remand is appropriate in Orr, Maples, and Acy, the Court will examine the second

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<sup>8</sup> The Court is aware of legal authority stating that “a defendant may not amend its notice of removal after the 30-day limit in § 1446(b) to remedy a substantive defect in the petition.” Stein v. Sprint Communications Co., L.P., 968 F. Supp. 371, 375 (N.D. Ill. 1997) (emphasis added). While a defendant may amend a removal notice after the 30-day deadline to make more clear the grounds already stated in the notice, a defendant may not normally amend a removal notice to state an entirely new, additional ground. See In re CBS Inc., 762 F. Supp. 71, 73 (S.D.N.Y. 1991) (“A petition for removal may be amended freely within the statutory 30-day period calculated from the date of service of the initial state court pleading. Thereafter it may be amended to set forth more specifically grounds for removal which were imperfectly stated in the original petition. The prior decisions have made a distinction between an ‘imperfect’ or ‘defective’ allegation and a wholly missing allegation, which cannot be supplied by amendment after the 30-day period has run.”); 14C Wright, Miller & Cooper, Federal Practice and Procedure §3733 at 537-38 (3<sup>rd</sup> ed. 1998) (“the notice may be amended only to set out more specifically grounds for removal that already have been stated, albeit imperfectly, in the original notice. \* \* \* Completely new grounds for removal jurisdiction may not be added and missing allegations may not be furnished, however.”).

The authorities cited, however, do not present the precise facts presented here, where the factual basis for the defendants’ presentation of the entirely new jurisdictional ground was (allegedly) not ascertainable until the service of “another paper.” Cases discussing successive notices of removal suggest that removal in these circumstances could be allowed, as a procedural matter. See, e.g., FDIC v. Santiago Plaza, 598 F.2d 634, 636 (1<sup>st</sup> Cir. 1979) (“a defendant who fails in an attempt to remove on the initial pleadings can file a removal petition when subsequent pleadings or events reveal a new and different ground for removal”). Thus, the Court will not remand the Orr, Maples, and Acy cases based solely on the fact that the defendants asserted their diversity / fraudulent joinder grounds for removal in an amended notice.

timeliness-of-removal argument made by the plaintiffs.

#### IV. Timeliness of Plaintiffs' Motion to Remand in 28 Mississippi Cases.

Just as there is a deadline for defendants to remove a case to federal court, there is also a deadline for plaintiffs to file a motion to remand. Pursuant to 28 U.S.C. §1447(c), “[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a).” (Emphasis added). Defendants assert that, in 28 different cases originally filed in Mississippi state courts, the plaintiffs missed this deadline, so the cases should be remanded. The Court refers to these cases below as “the 28 Cases,” and the Court lists the 28 Cases in the appendix attached to this Order.<sup>9</sup>

In all of the 28 Cases, the plaintiffs named both diverse and non-diverse defendants. The diverse defendants then removed the 28 Cases to Mississippi federal court, asserting that the plaintiffs had joined the non-diverse defendants fraudulently, solely to defeat federal diversity jurisdiction. The defendants removed the 28 Cases to federal court on July 21 and 22, 2003. The plaintiffs then filed motions to remand the 28 Cases on September 5, 2003, which was at least 45 days after the cases were removed. At first glance, then, defendants appear correct in their assertion that the plaintiffs filed their motions to remand past the 30-day deadline.

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<sup>9</sup> Of the 54 cases before the Court in which a motion to remand is pending, 47 were originally filed in Mississippi state court. The plaintiffs assert that, in 43 of these 47 cases, the defendants' removal to Mississippi federal court was untimely. The defendants respond that, in 28 of these 43 cases, the plaintiffs' motion to remand to Mississippi state court was itself untimely. It is these latter 28 cases that the Court addresses in this Order. The defendants did not argue that the plaintiffs' motion to remand was untimely in Ruth, Orr, Maples, or Acy.

The analysis, however, is made slightly more complicated because, shortly before the defendants removed the 28 Cases to federal court, this Court entered an Order staying proceedings in this MDL. Specifically, soon after this MDL was assigned to this Court, the Court learned that a law firm whose appearance generally requires the Court's recusal might play a role in this case. In order to determine whether recusal was necessary in the unique context of this proceeding, the Court asked "the Committee on Codes of Conduct for United States Judges [for] an advisory opinion." Order at 1 (July 7, 2003) (docket no. 5). On July 7, 2003, pending receipt of this advisory opinion, and with the agreement of the parties, the Court entered an Order "STAY[ING] this matter in its entirety." *Id.* at 1-2 (emphasis in original). The Court added, however, that it was not staying the continued transfer of cases to it by the MDL Panel:

The Court will continue, however, to receive "tag-along cases." All discovery proceedings in these and any related actions are stayed until further Order of this Court. The time requirements to perform any act or file any papers, pursuant to Rules 26 through 37, Federal Rules of Civil Procedure, are tolled until the first pretrial conference, at which time a discovery schedule will be established. Through their proposed interim lead/liaison counsel, the parties have consented to this limited stay.

*Id.* at 2. The Court's stay continued in effect for 37 days until August 13, 2003, when the Court, having learned that it need not recuse, lifted the stay and set out the practices and procedures that would govern the case as it went forward. *See* docket no. 7.

The plaintiffs point to the 37-day stay and explain that they did not move to remand the cases earlier because they believed the stay precluded them from doing so. The Court has some sympathy for this

argument, but is ultimately unpersuaded.<sup>10</sup> As noted, the defendants removed the 28 Cases to Mississippi federal district court on July 21 and 22, 2003. The MDL Panel then entered “Conditional Transfer Order No. 3” (“CTO-3”), transferring the 28 Cases from the Mississippi federal district court to this Court.<sup>11</sup> See docket no. 36. Although the MDL Panel filed CTO-3 on September 9, 2003, the order itself made clear that CTO-3 did not take effect for more than two weeks:

This order does not become effective until it is filed in the Office of the Clerk of the United States District Court for the Northern District of Ohio. The transmittal of this order to said Clerk shall be stayed fifteen (15) days from the entry thereof and if any party files a notice of opposition with the Clerk of the Panel within this fifteen (15) day period, the stay will be continued until further order of the Panel.

CTO-3 at 1. In fact, after no party filed an opposition to transfer, the MDL Panel lifted the stay of transmittal on September 25, 2003. This Court then filed CTO-3 on September 30, 2003. See docket no. 36. The upshot of these procedures is that, before the 28 Cases were officially transferred to this Court, they were pending in the Mississippi federal district court for at least 70 days – from July 21 & 22, 2003 (the date of removal) to September 30, 2003 (the effective date of MDL transfer). Furthermore, the 28 Cases were pending in the Mississippi federal district court for at least 49 days – from July 21 & 22, 2003 (the date of removal) to September 9, 2003 (the MDL Panel’s filing of CTO-3) – before they were even arguably

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<sup>10</sup> The Court is sympathetic because the language of the Court’s Order was less than precise. The Court stated that “[a]ll discovery proceedings in these and any related actions are stayed until further Order of this Court.” It was not unreasonable for the parties to assume that “all related actions” included federal cases that, although not yet marked as “tag-along cases” related to this MDL, were virtually certain to become so. Still, the Court’s Order stayed only “discovery proceedings” and not, for example, the filing of motions to remand. And, even if the Court’s language did suggest that the stay applied to cases not yet made a part of this MDL (conditionally or otherwise), the parties and the Court remain bound by the tautology that the Court cannot stay a case over which it has no jurisdiction.

<sup>11</sup> Actually, CTO-3 transferred only 27 of the 28 Cases, but the Court’s analysis is the same as to the 28<sup>th</sup> case; see footnote 7, below.

consolidated into the MDL by virtue of having been named in a conditional transfer order. Thus, the plaintiffs in the 28 Cases missed their 30-day deadline for filing motions to remand before this Court's MDL stay ever applied to them.<sup>12</sup>

Simply, the fact that this Court stayed proceedings in the MDL for 37 days did not work to extend the statutory time within which plaintiffs were required to file a motion to remand in the 28 Cases, because the 28 Cases were not a part of the MDL until after this Court lifted the stay. Plaintiffs suggest that, once the MDL Panel filed CTO-3, they were under the jurisdiction of both the Mississippi federal district (transferor) court and this (transferee) Court, so that the Court's stay did toll the 30-day period allowed under 28 U.S.C. §1447(c). Plaintiffs also suggest that, because the "conditional" nature of CTO-3 made it less than completely clear whether this Court's MDL stay affected them, they should get the benefit of the doubt, since "[a]ny ambiguities are construed against removal because the removal statute should be strictly construed in favor of

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<sup>12</sup> The Court confesses here that one of the 28 Cases – Campbell v. Lincoln Elec. Co., 03-CV-17020 – does not fit precisely into the above analysis, because Campbell was transferred to this Court via CTO-2, not CTO-3. The result, however, does not change: (1) defendants removed Campbell to Mississippi federal district court on July 21, 2003; (2) the MDL Panel filed CTO-2 on August 8, 2003; (3) this Court filed CTO-2 on August 29, 2003, making the transfer of Campbell non-conditional and official (see docket no. 14); and (4) plaintiffs filed their motion to remand on September 5, 2003. The upshot of these procedures is that, before Campbell was officially transferred to this Court, it was pending in the Mississippi federal district court for 39 days. It is true that Campbell was pending only 18 days before the MDL Panel filed CTO-2, but: (1) as noted clearly in the order itself, the MDL Panel's filing of CTO-2 did not work to transfer Campbell to this Court; and (2) even if the transfer date was when the MDL Panel filed CTO-2 (which it is not), another 23 days passed between the date this Court lifted its stay (Aug. 13, 2003) and the date the Campbell plaintiffs filed their motion to remand (Sept. 9, 2003).

In other words, by the time the plaintiffs filed their motion to remand in Campbell, they had been free from even an arguable restraint from filing that motion for a total of 41 days – 18 days while under the jurisdiction of the Mississippi federal district court and before CTO-2 was filed, and 23 days while under the jurisdiction of this Court after the stay was lifted. Given the 30-day deadline imposed by §1447(c), the motion in Campbell was also filed late.

remand.” Manguno v. Prudential Property and Cas. Ins. Co., 276 F.3d 720, 723 (5<sup>th</sup> Cir. 2002).

Plaintiffs’ arguments must fail, however, because CTO-3 is not ambiguous – it states clearly that the 28 Cases do not transfer to the jurisdiction of this Court until this Court files the order. As explained in the Manual of Complex Litigation:

Once a transfer under §1407 becomes effective – when the order granting the transfer is filed in the office of the clerk of the transferee court – the jurisdiction of the transferor court ceases and the transferee court has exclusive jurisdiction. During the pendency of a motion (or show cause order) for transfer, however, the court in which the action was filed retains jurisdiction over the case.

Federal Judicial Center, Manual for Complex Litig. (Third) 252 at §31.131 (1995) (footnotes omitted); see In re Four Seasons Securities Laws Litig., 362 F.Supp. 574, 575 n.2 (Jud. Pan. Mult. Lit. 1973) (“[t]he mere pendency of a motion [to transfer] before the [MDL] Panel . . . does not in any way limit the jurisdiction of the transferor court to rule upon matters properly presented to it for decision”); Rule 18, Rules of Procedure of the Judicial Panel on Multidistrict Litigation (“The pendency of a . . . conditional transfer order . . . does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court. A transfer or remand pursuant to 28 U.S.C. §1407 shall be effective when the transfer or remand order is filed in the office of the clerk of the district court of the transferee district.”). Indeed, to accept the proposition that the 28 Cases were subject to the simultaneous jurisdiction of both the transferor and transferee courts would be to allow for the possibility that two federal

courts would rule differently on the same motion in the same case.<sup>13</sup> Furthermore, “a district court has no discretion to remand to state court when a motion to do so is grounded on improper removal procedures and that motion is not made within thirty days following filing [of the removal notice].” Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560, 566 (5<sup>th</sup> Cir. 1995).

In sum, the Court agrees with the defendants that plaintiffs missed the deadline within which they were required to file a motion to remand in the 28 Cases. Accordingly, the motions to remand filed in the 28 cases must be denied to the extent those motions are based on the assertion that the defendants missed their removal deadline, because the plaintiffs missed their own deadline to raise procedural errors.

Importantly, however, 28 U.S.C. §1447(c) imposes a 30-day deadline on the plaintiffs only in connection with raising procedural defects in removal, and not in raising lack of federal jurisdiction:

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. §1447(c) (emphasis added). See Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1291 n.9

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<sup>13</sup> It is for this reason, of course, that there exists a general “prohibition against two courts simultaneously exercising jurisdiction over a case.” Fobian v. Storage Technology Corp., 164 F.3d 887, 889 (4<sup>th</sup> Cir. 1999) (referring to a federal trial and appellate court exercising jurisdiction over the same case). Although two different federal district courts may obtain simultaneous jurisdiction over two cases that present the same dispute – which, when it occurs, usually requires an analysis of who won the “race to the courthouse,” and which court should grant a motion to transfer or stay – plaintiffs offer no example of two different federal courts simultaneously exercising jurisdiction over a single case. The same holds true for a state and federal court, which might exercise simultaneous jurisdiction over two cases presenting the same dispute (thereby implicating abstention issues), but never simultaneous jurisdiction over a single case. See also In re Plumbing Fixture Cases, 298 F. Supp. 484, 495 (Jud. Pan. Mult. Lit. 1968) (“[t]wo courts of exclusive different jurisdictions, or venues, cannot exercise control over the same single claim for relief at the same time”).



(11<sup>th</sup> Cir. 1998) (“[b]ecause there is no time limit for motions to remand that challenge subject matter jurisdiction, plaintiff’s motion was timely filed”). In their motions to remand filed in the 28 Cases, plaintiffs also assert that federal diversity jurisdiction did not exist at the time of removal and does not exist now, because the non-diverse defendants were not fraudulently joined. The Court will address this argument in a separate opinion.

**IT IS SO ORDERED.**

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

**APPENDIX**

The 28 Cases referred to in the Court's Order are listed in the following table.

<b>MDL Case Number</b>	<b>Original Case Number</b>	<b>Case Title</b>	<b>Transferor Court</b>	<b>Transfer Date</b>	<b>Conditional Transfer Order</b>
1:03-17020	5:03-389	Campbell v Lincoln Electric Co.	MSS	8/29/03	CTO-2
1:03-17039	1:02-659	Smith v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17042	1:03-662	Broughton v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17043	1:03-663	Maye v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17049	3:03-918	Dubose v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17050	3:03-919	Williams v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17054	3:03-928	Presher v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17057	4:03-279	Bender v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17058	4:03-280	Graham v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17059	4:03-282	Mattix v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17060	5:03-385	Shaifer v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17061	5:03-386	Jackson v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17062	5:03-387	Johnson v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17063	5:03-391	Carr v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17064	5:03-392	Fife v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17067	5:03-395	Archer v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17068	5:03-397	Armstrong v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17069	5:03-399	Cadney v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17070	5:03-400	Pickering v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17071	5:03-401	Pickering v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17072	5:03-402	Woods v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17073	5:03-403	Kilcrease v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17074	5:03-404	Mackey v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17075	5:03-405	Stander v Lincoln Electric Co.	MSS	9/30/03	CTO-3

<b>MDL Case Number</b>	<b>Original Case Number</b>	<b>Case Title</b>	<b>Transferor Court</b>	<b>Transfer Date</b>	<b>Conditional Transfer Order</b>
1:03-17076	5:03-406	Torrain v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17077	5:03-407	Stringer v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17078	5:03-408	Wells v Lincoln Electric Co.	MSS	9/30/03	CTO-3
1:03-17079	5:03-409	Wells v Lincoln Electric Co.	MSS	9/30/03	CTO-3