**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| **IN RE: WELDING ROD PRODUCTS LIABILITY LITIGATION** | : | **Case No. 1:03-CV-17000** |
| | : | **(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)** |
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| | : | **JUDGE O'MALLEY** |
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| | : | **MEMORANDUM AND ORDER** |
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On December 30, 2003, the Court entered an Order which, among other things, remanded Ruth v. Lincoln Electric Co., case no. 03-CV-17003, along with ten related constituent cases, to Mississippi state court. See Master Docket no. 101 ("First Remand Order").[1] The defendants immediately filed a motion to reconsider, as well as a motion to stay the remand. The Court granted the motion to stay.

The Court now enters this Order **DENYING** the motion to reconsider (03-CV-17003, docket no 6). Accordingly, the Court's stay is lifted, and the Ruth case (together with the ten related constituent cases)

[1] 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 of the ten cases** listed in docket no. 5 of Ruth. These ten cases are reflected in the caption of this Order.

is hereby **REMANDED** to the Circuit Court of the First Judicial District of Hinds County, Mississippi, where it was originally filed.

I.

At the risk of extreme oversimplification, the essence of the analysis in the Court's First Remand Order ran as follows: (1) the amended complaint in Ruth gave the defendants enough notice that certain affirmative federal defenses might be available (e.g., the government contractor defense, and the Defense Production Act) that some of the defendants went ahead and actually pled those defenses in their answers; (2) those defendants that pled federal defenses gave notice to all the other defendants that the federal defenses were colorable and available; (3) at the latest, a defendant was required, under the second sentence of 28 U.S.C. §1446(b), to remove Ruth within 30 days of having received such notice in their co-defendants' answers; and (4) because no defendant removed within this period, Ruth must be remanded. In their motion for reconsideration, the defendants challenge several of these premises.

A. Notice of Facts Suggesting Removal Jurisdiction.

First, the defendants insist, again, that the "passing reference to Ingalls [Shipyard]" contained in the amended complaint in Ruth "can hardly be said to have put the defendants on notice that they could assert federal officer removal." Motion to reconsider at 3. Indeed, even though some of the defendants actually asserted in their Answers the government contractor defense that underlies federal officer removal, the defendants argue they were not obligated to go ahead and actually remove the case until discovery showed that the defense had a valid factual predicate. That is, the defendants argue they asserted "only ***conditional*** government contractor defenses in their Answers," and they could not in good faith remove the case (much

less come under statutory obligation) until they had reason to believe the condition was not theoretical. Reply at 1 (emphasis in original).

Defendants cite law from the Fifth Circuit Court of Appeals supporting their argument that they should not have to undertake this type of "protective removal." Motion at 3 (citing Bosky v. Kroger Texas, L.P., 288 F.3d 208 (5th Cir. 2002)). Although there is some logic to the Bosky opinion, the Court ultimately finds it unpersuasive, and contrary to Sixth Circuit case law. This Court earlier concluded that, "[h]aving 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." First Remand Order at 7. The Bosky opinion suggests that a federal defense simultaneously can have: (1) enough color that its assertion is appropriate, but (2) insufficient factual certainty, so that the removal clock does not begin to tick. In the case of Holston v. Carolina Freight Carriers Corp., 1991 WL 112809 (6th Cir. June 26, 1991), however, the Sixth Circuit Court of Appeals made it clear that it would not follow the reasoning in Bosky.[2]

In Holston, the plaintiff, a union employee, filed a complaint in state court against his employer. The employer-defendant did not immediately remove, instead filing an answer in state court. Later, the employer filed an amended answer, asserting an affirmative defense based on preemption under §301 of the Labor Management Relations Act ("LMRA"), but still did not remove the case to federal court. Only after the employer deposed the plaintiff, at which time he "admitted facts that showed he was a member of the union," did the employer file a removal petition. Holston, 1991 WL 112809 at *1. The plaintiff moved to remand

[2] Although Holston is not a published opinion, the Court notes that two of the three judges who decided the case either are or were Chief Judges of the Sixth Circuit Court of Appeals. It is clear that Holston "has precedential value in relation to a material issue in [this] case, and that there is no published opinion" that addresses these issues equally well. Sixth Cir. Rule 28(g).

the case, arguing that his employer had ascertained that removal was appropriate, at the latest, on the date when it filed the amended answer – which was more than 30 days earlier than the date if filed its removal petition.

The district court denied the motion to remand, and eventually addressed the plaintiff' claims on the merits, granting summary judgment to the defendant. The Sixth Circuit Court of Appeals, however, annulled the district court's efforts, concluding that the district court never had jurisdiction because the employer did not timely file its removal notice. In reaching this conclusion, the Court of Appeals examined the second sentence of 28 U.S.C. §1446(b), the same provision this Court examined in its First Remand Order. The Holston court had to choose whether this sentence meant that: (1) "the thirty-day clock [starts] running only when the defendant receives information about the removability of a case from another source;" or instead, (2) "the statute triggers the thirty-day period from the receipt of notice of facts that lead to the possibility of removal, not from a clear statement that the case is removable." Id. at *3. The appellate court chose the latter meaning, even though it "is against the majority of authority." Id. at *4. And the Sixth Circuit further held that the information the defendant "receives" regarding the possible removability of the lawsuit may, in fact, come "from papers [already] within its own possession." Id.

Applying its reasoning, the Sixth Circuit in Holston concluded that the 30-day clock began to tick, at the latest, "as of the date on which [the defendant's] amended answer that raised a 'pre-emption' defense was filed by stipulation." Id. at *5. The court reasoned:

> Prior to this amended answer, none of [the defendant's] four defenses pertained peculiarly to a federal labor law claim. It is not at all a leap in logic to surmise that some new information had been found by [the defendant] in the interim period between the filing of the initial answer and that of the amended answer. That new information clearly must have given [the defendant] serious reason to believe that [the plaintiff's] claim was in fact a federal one, as

> otherwise the particular defenses added to the answer would be of limited relevance to a state proceeding.

Id. at *6. The Sixth Circuit also rejected the argument, made also by the defendants in this case, that the federal defense was asserted only "conditionally" – "[w]e view the amended answer as establishing that at an unknown earlier date [the defendant] had persuaded itself that it was in reality facing a §301 suit, and that it ought to adjust its litigation strategy accordingly [by adding its federal defenses in its am ended answer]. It is precisely this certain knowledge that triggers the running of the thirty-day period within which removal petitions must be filed." Id.

Admittedly, there are certain facts supporting the Holston court's conclusion that are not present in this case. For example, the Sixth Circuit found meaningful the fact that, in Holston, all four of the "new" defenses added by the defendant in its amended answer were directed at federal claims. Id. at *6. But there are also case-specific facts present here that support this Court's conclusion that the reasoning of Holston is apposite – including, for example: (1) the defendants knew generally that at least some of them had supplied welding rods to welders working on federal projects at Ingalls Shipyard; and (2) at least one of the defendants had earlier received a deposition disclosing that plaintiff Smith had worked as a welder on "at least 24 U.S. Navy vessels." The point in Holston is that the removal clock starts to tick as soon as the defendants have fair notice of any kind from any source that removal is probably appropriate, including information already in their own possession. Holston explicitly adopts the minority view, and is at clearly at odds with Bosky. Most important, Holston reaffirms, in the context of examining the second sentence of §1446(b), that "the statutes conferring removal jurisdiction are to be construed strictly" and in favor of remand. Holston, 1991 WL 112809 at *3. Even in light of Bosky, the Court remains convinced that, in this case, there was enough color

to the defendants' federal affirmative defenses at the time the defendants included them in their Answers, and enough facts known to the defendants, that removal was required under the bright-line rule recited in §1446.

B. Joinder of All Defendants in Removal.

The defendants also note – correctly – that the Court erred when it examined the time within which each defendant was obligated to remove. In its First Remand Order, the Court wrote:

> 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.

First Remand Order at 4 n.3. In fact, however, the unanimity requirement contained in §1441(a) does not apply to federal officer-based removals under 28 U.S.C. §1442. Section 1442 removal allows removal by any defendant who may assert the federal removal defense, alone, regardless of whether any other defendant could or does join in the removal. See Torres v. CBS News, 854 F. Supp. 245, 246 n.2 (S.D.N.Y. 1994) ("Section 1442 is an exception to the general rule that all defendants must join in a notice of removal"); Howes v. Childers, 426 F. Supp. 358, 359 (D. Ky. 1977) ("When a single federal officer timely removes a case to federal court under 28 U.S.C. §1442(a)(1), the entire case is thereby removed, regardless of whether other defendants, federal officers or not, properly join in the petition for removal"). Thus, if any defendant met the 30-day deadline set out in the second sentence of 28 U.S.C. §1446(b), this Court's remand of Ruth is not appropriate.

Despite the Court's error in assuming the defendants had met the unanimity requirement, however, the result does not change. As the Court stated earlier, "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." First Remand Order at 8. A number of defendants raised federal defenses in their Answers on January 25, 2002, and served those Answers on all other defendants. Nonetheless, no defendant took any action to remove Ruth to federal court until April 24, 2002, well past the 30-day deadline. The principle premise of the Court's earlier analysis does not change – each defendant knew that Ruth was removable by, at the latest, January 25, 2002, but no defendant removed the case until three months later.

C. "Conditional" Assertion of Affirmative Defenses.

Finally, the defendants point out that, although "a few defendants did unequivocally assert the government contractor defense in their [A]nswers," most defendants "asserted the government contractor defense only conditionally," and "some did not assert it at all." Motion at 4. The defendants argue that those who did not assert the federal defense "unequivocally" should be allowed to remove the case within 30 days of having first learned the defense actually had clear factual support. The Court addressed this argument earlier, and disagrees. Even if a given defendant did not initially plead "unequivocally" a federal defense, it received notice that federal defenses were available and colorable when it received a co-defendant's answer asserting those federal defenses. This notice, in the circumstances of this case, was sufficiently clear to start the 30-day removal clock for all defendants under §1446(b). To accept the Ruth defendants' argument that

they or their co-defendants could assert an affirmative federal defense, but have no obligation to remove Ruth based on that same federal defense until the facts supporting it became known through outside discovery, is untenable and would blur unacceptably the bright-line rule recited in §1446 – which this Court must strictly construe.[3]

II.

In sum, the Court concludes that none of the arguments set out by the defendants in their motion to reconsider are persuasive. Accordingly, the motion is denied. The Court's earlier stay is lifted, and the Ruth case (together with the ten related constituent cases) is remanded to Mississippi state court.

**IT IS SO ORDERED.**

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

[3] The Court notes again that the ruling it reaches is specific to the circumstances in this case. The Court also notes again that it is relying on the reasoning in Holston v. Carolina Freight Carriers Corp., 1991 WL 112809 (6th Cir. June 26, 1991), which holds that: (1) the 30-day period set out in the second sentence of 28 U.S.C. §1446(b) must be strictly construed in favor of remand; and (2) any information received by the defendant showing the case is removable starts the 30-day clock, even information obtained outside of discovery and known only to the defendant.