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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: WELDING FUME PRODUCTS LIABILITY LITIGATION	:	**Case No. 1:03-CV-17000**
	:	**(MDL Docket No. 1535)**
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	:	**JUDGE O'MALLEY**
	:	
	:	**MEMORANDUM AND ORDER**
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On May 29, 2003, the case of *Adames v. AGA Gas, Inc.* was filed in West Virginia state court. The amended complaint in the *Adames* case listed 3,762 individual plaintiffs, a pleading practice which West Virginia law apparently allowed. The plaintiffs all claimed they suffered some form of neurological injury caused by inhaling welding fumes. On April 2, 2004, the defendants removed the *Adames* case to federal court, and the Judicial Panel on Multi-District Litigation then transferred the case to this Court as related to *In re Welding Fumes Product Liab. Litig.*, MDL docket no. 1535, case no. 03-CV-17000.

Because the joinder of unrelated individuals as parties-plaintiff is not authorized by the Federal Rules of Civil Procedure, this Court had previously ordered that each multi-plaintiff case "shall 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." Order at 2 (Nov. 20, 2003) (MDL docket no. 59) (emphasis in original, citing Fed. R. Civ. P. 21). Accordingly, the plaintiffs in the *Adames* case were

severed and assigned their own case numbers.[1]

The plaintiffs now move to remand the *Adames* case and all of the constituent severed cases back to the Marshall County, West Virginia Circuit Court where the case was originally filed (docket no. 676). For the reasons stated below, this motion is **DENIED**, without prejudice.[2] Further, the Court **ORDERS** the defendants to respond to the *Cary* Remand Motion (docket no. 647), as explained in Section II.C of this Order.

I.

In their removal papers, the defendants asserted that: (1) on March 5, 2004, the defendants learned that one of the plaintiffs named in the *Adames* complaint, Johnnie Moore, had worked on United States Navy ships at the Todd Shipyard in Galveston Texas; and (2) the *Adames* case was, therefore, "removable pursuant to the Federal Officer Removal Statute, 28 U.S.C. §1442(a)(1), because Mr. Moore's alleged exposure to welding fumes . . . would necessarily have involved welding rods designed, manufactured and packaged pursuant to U.S. government military specifications." Notice of removal at ¶7. The removing defendants added that they had two colorable federal defenses that served to fulfill the jurisdictional requirements: (a) the military contractor defense; and (2) the Defense Production Act.

In their motion to remand, the plaintiffs asserted two arguments: (1) the removal was untimely; and

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[1] The case numbers assigned to the various *Adames* plaintiffs range from 04-CV-19197 to 04-CV-22628, while skipping the range of 04-CV-20000 through 04-CV-20999 (which are reserved for asbestos cases). This represents just over 2,400 plaintiffs; over a thousand of the plaintiffs listed in the original complaint have dismissed their claims.

[2] For the meaning of the Court's ruling being "without prejudice," see section II.B of this Order.

(2) neither the military contractor defense nor the Defense Production Act were colorable federal defenses. After the plaintiffs filed their motion, however, the Court issued a number of Orders addressing other motions to remand; one of these Orders concluded that the defendants' military contractor defense was colorable, thereby providing a valid basis for federal jurisdiction. *See Second Remand Order* (docket no. 224) at 13-24. This conclusion applies equally to the *Adames* remand motion, as the plaintiffs have recognized.[3] Thus, the plaintiffs now rely only on their argument that the removal was untimely.

Yet another of the Court's earlier Orders, which also addressed other motions to remand, examined in detail similar timeliness arguments. *See First Remand Order* (docket no. 101) at 3-8 (discussing, among other things, remand of the *Ruth* case). In the *First Remand Order*, the defendants removed the *Ruth* case from state court well after the 30-day deadline normally imposed by the first sentence of 28 U.S.C. §1446(b). The defendants asserted, however, that this 30-day deadline was extended by the second sentence of §1446(b) – the "other paper" rule – which allows a notice of removal to 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." The Court rejected the defendants' argument, concluding that all of the defendants had notice of facts revealing the viability of removal jurisdiction at least three months before any defendant actually removed the *Ruth* case. *See First Remand Order* at 5-8; *see also* docket no. 148 at 7 (denying motion to reconsider the *First Remand Order*). Accordingly, the Court granted the motion

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[3] In their reply brief, the plaintiffs abandoned their arguments that defendants do not have any colorable federal defense as to those plaintiffs who worked on United States Navy Ships. With regard to plaintiffs named in the *Adames* complaint who did *not* work on United States Navy Ships, see section II.A of this opinion.

to remand *Ruth.*

The plaintiffs now ask the Court to apply the same reasoning used in the *First Remand Order* to the *Adames* case. As noted, the *Adames* case was filed in West Virginia state court on May 29, 2003, and the defendants removed the case to federal court on April 2, 2004, over 10 months later. The plaintiffs argue this removal was untimely, and the defendants again seek to rely on the second sentence of §1446(b). Specifically, the defendants argue that: (1) the *Adames* complaints (both original and first amended) list the state of residency and places of employment for *none* of the 3,762 named plaintiffs; (2) the *Adames* complaints allege no concrete facts hinting that *any one* of the plaintiffs suffered exposure to welding fumes while working on a federal enclave or a United States Navy ship;[4] (3) on March 5, 2004, defendants received the deposition of *Adames* plaintiff Johnnie Moore, who testified he had worked at the Todd Shipyard in Galveston, Texas; (4) the defendants made inquiries and learned that welders at the Todd Shipyard do work on United States Navy ships; (5) before that point in time, the defendants had no factual basis to believe there existed grounds for assertion of the military contractor defense; and (6) therefore, the defendants' notice of removal was filed within 30 days of the date of receipt of a "paper from which it [could] first be ascertained that the case is one which is or has become removable," 28 U.S.C. §1446(b).

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[4] The *Adames* first amended complaint does include the following "allegation," which is more in the nature of legal argument: "The federal courts lack subject matter jurisdiction over this action, no federal question is raised and there is incomplete diversity of citizenship. Removal would be improper. Every claim arising under the Constitution, treaties, or laws of the United States is expressly disclaimed (including any claim arising from an act or omission on a federal enclave or of any officer of the U.S. or any agency or person acting under him occurring under color of such office). No claim of admiralty or maritime law is raised. Plaintiffs sue no foreign state or agency." Complaint at ¶57. While an argument could conceivably be made that this paragraph implies that some of the plaintiffs did work on a federal enclave or a United States Navy ship, the plaintiffs do not actually make this argument, and any such implication is very weak.

The plaintiffs take issue with the last two points. The plaintiffs argue that, six months before the defendants received the Moore deposition, the defendants had received another "paper" giving them reason to know there were grounds to assert the military contractor defense. Specifically, the plaintiffs note that, on September 9, 2003, the National Electrical Manufacturers Association ("NEMA") filed an answer in the *Adames* case explicitly asserting the government contractor defense. The plaintiffs argue that NEMA's service of this answer on all of the defendants gave them notice that the case was removable pursuant to §1446(b). The plaintiffs remind the Court that it used essentially this analysis in the *First Remand Order*.

The Court concludes, however, that there are critical differences between the circumstances described in the *First Remand Order* and the circumstances in the *Adames* case. In the *First Remand Order*, the *Ruth* complaint included explicit allegations that several of the *Ruth* plaintiffs worked at the Ingalls Shipyard in Pascagoula, Mississippi. The defendants already knew that ships were built at Ingalls "pursuant to both private and government contracts." *First Remand Order* at 5.[5] Thus, it was unsurprising that, in their answers in *Ruth*, a dozen or more manufacturing defendants interposed the military contractor defense, using (for example) the following language:

> In the event that any Plaintiff alleges that he was exposed to any of Defendant's products, which were provided pursuant to a contract with the United States Government or otherwise provided under a contract whereby such products were to meet government or military specifications then, the use by Plaintiffs 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 * * * . Defendant specifically pleads the government contractor defense.

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[5] Beyond having general knowledge that welders at Ingalls Shipyard frequently worked on Navy ships, the attorney for one of the defendants had previously deposed one of the *Ruth* plaintiffs (Troy Smith) in another case, at which time Smith had stated he had worked as a welder on "at least 24 U.S. Navy vessels." *See First Remand Order* at 5 n.5.

Lincoln Elec.'s Answer, Thirty-Sixth Defense.

In response to the plaintiffs' remand motion, the *Ruth* defendants argued this defense was simply a "placeholder" mechanism, allowing them to rely upon the defense if and when they discovered facts supporting it. The Court, however, rejected this "conditional" declaration of a defense as merely a mechanism to avoid the 30-day removal clock: "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." *First Remand Order* at 5 n.5. Put differently, "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. *Reconsideration Order* (docket no. 148) at 5-6.

In contrast, in the *Adames* case, the complaint does not include any allegation even hinting that any of the plaintiffs ever welded on or near a Navy ship, or even in a shipyard, or even in a state where a shipyard sits. It is probably for this reason that, unlike in the *Ruth* case, none of the manufacturing defendants asserted the government contractor defense in their answers to the *Adames* complaint. The only defendant that asserted the government contractor defense was NEMA; as a trade association, NEMA is even more distant from the plaintiffs and would have no reason to know where the plaintiffs worked or what they welded. Thus, NEMA's choice to assert the defense cannot fairly be characterized as borne out of any knowledge that a given plaintiff welded for the federal government or on government property. In sum, unlike in *Ruth*, there was no color to NEMA's military contractor defense at the time NEMA included it in its answer.

While the Court remains sure that its jurisdictional rulings in the *Ruth* case, as set out in the *First*

Remand Order and the *Reconsideration Order*, are correct, the defendants did show that the analytical reed upon which those two Orders rest is slender. *See Reconsideration Order* at 3-6 (noting that the defendants' position had some logic, and that the Sixth Circuit's view on protective removals is "against the majority of authority"). With their current arguments in the *Adames* case, the plaintiffs seek too narrow a reading of the defendants' right to removal under the second sentence of §1446(b). The Court concludes the defendants did timely remove the *Adames* complaint, given all the circumstances of the case at the time of removal.

II.

A. Supplemental Jurisdiction.

As noted, the *Adames* case was a multi-plaintiff case when originally filed, as well as when removed; after removal, the Court severed the plaintiffs into over 2,400 separate cases. The defendants argue that the Court: (1) should exercise supplemental jurisdiction over each one of these 2,400-plus cases, even if the plaintiff in a given case did not weld on a federal enclave or on a United States Navy ship; and (2) alternatively, if the Court chooses not to exercise supplemental jurisdiction over certain plaintiffs, and thus chooses to remand their cases, the Court should not allow the remanded plaintiffs to re-join into one multi-plaintiff case in West Virginia state court.

The Court must reject both suggestions. As the Court has stated previously, it "is generally not disposed to exercise pendent party jurisdiction, . . . and this inclination only increases when the pendent party has been severed for improper joinder." *Arredondo Remand Order* (docket no. 811) at 3 (citing

28 U.S.C. §1367(c)(3)).[6] Thus, in any individual case where there is no factual basis for the defendants to assert a colorable federal defense against a specific plaintiff that serves to fulfill the jurisdictional requirements, the Court does not have and will not exercise jurisdiction. At this juncture, neither the Court nor the parties knows whether there is such a factual basis in each case. Accordingly, as discussed in section II.B below, the denial of the plaintiffs' motion to remand in each severed case is without prejudice.

Further, the Court must reject defendants' suggestion that it enter any subsequent remands "with the caveat that . . . [the remanded cases] cannot be rejoined in state court." Brief in opp. at 17. If the Court concludes it does not have jurisdiction over a given case, then its power over the parties is at an end. Similarly, this Court has no authority over any other court which does have jurisdiction over the case. Whether any plaintiffs whom this Court remands to West Virginia state court may later re-join in state court is a matter for that court, not this one.

B. Without Prejudice.

As a general matter, "a motion to remand may be made at any time before final judgement." *DaCosta v. Novartis AG*, 180 F.Supp.2d 1178, 1183 (D. Or. Aug. 31, 2001); *see Duncan v. Stuetzle*, 76 F.3d 1480, 1491 (9th Cir. 1996) (plaintiff's motion to remand action to state court was timely, even

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[6] Indeed, the Court's "inclination" appears to be a requirement in these circumstances. *See Ortolf v. Silver Bar Mines, Inc.*, 111 F.3d 85, 86-87 (9th Cir. 1997) ("Supplemental jurisdiction must be exercised in the *same action* that furnishes the basis for exercise of supplemental jurisdiction. The power of federal courts to exercise supplemental jurisdiction extends to 'all other claims that are so related to claims in the action' when a district court has original jurisdiction 'in any civil action.' 28 U.S.C. §1367(a). The phrases 'in any civil action' and 'in the action' require that supplemental jurisdiction be exercised in the same case, not a separate or subsequent case.") (emphasis added).

though filed one week before trial). This remains true even after an initial motion to remand is denied. *Dacosta*, 180 F.Supp.2d at 1183 (denying "without prejudice with leave to renew" a motion to remand because, although "the current record is insufficient to grant Plaintiffs' Motion to Remand, Plaintiffs may renew their challenge to this Court's jurisdiction in a later motion submitted with proper evidentiary support"). Given the peculiarities of the removal/severance procedure that occurred in the *Adames* case, it is virtually certain that a valid basis for federal removal jurisdiction does *not* exist in some of the now-severed cases. Only after some discovery has occurred, however, will the parties learn whether there is a factual, jurisdictional basis for the military contractor defense. Accordingly, the plaintiffs in any of these severed cases may renew their motion for remand, once the jurisdictional facts become clear.

The Court adds, however, that it is hopeful that the parties will file *stipulated* motions for remand, in all but the most difficult cases. *See Fourth Remand Order* (docket no. 810) at 1-2 (noting that the parties have applied the Court's prior remand Orders and stipulated to remands in certain cases); *id.* at 3-9 (giving further guidance on when remand is appropriate by resolving other, disputed cases); *Arredondo Order* at 2-3 (giving further guidance).[7]

C. *Cary* Remand Motion

Finally, the Court notes that there remains pending at this time one other motion to remand. *See*

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[7] *See also Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) ("Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources.") (internal quotation marks omitted)); *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 425 (4th Cir. 1999) ("Jurisdictional rules direct judicial traffic. They function to steer litigation to the proper forum with a minimum of preliminary fuss. * * * To permit extensive litigation of the merits of a case while determining jurisdiction thwarts the purpose of jurisdictional rules.")

docket no. 647 (moving to remand a number of Mississippi cases) ("*Cary* Remand Motion"). The parties have informed the Court, however, that they agreed to suspend briefing on this motion because the resolution of the *Adames* remand motion was likely to be instructive. Accordingly, the Court now **ORDERS** the defendants to file a response to the *Cary* Remand Motion, within 21 days of the date of this Order, which response will be either: (1) an opposition brief on the merits, incorporating the analysis set out in this and the Court's other Orders addressing federal jurisdiction; or (2) a joint stipulated Order agreeing with the plaintiffs on the extent of the Court's jurisdiction over all of the severed cases addressed in the *Cary* Remand Motion.

IT IS SO ORDERED.

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

DATED: April 5, 2005