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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 December 30, 2003, this Court addressed certain motions to remand that were pending in a number of cases which have been consolidated in this Multi-District Litigation. See docket no. 101 ("First Remand Order"). In its First Remand Order, the Court resolved certain procedural issues, which yielded a ruling on a few of the remand motions. The Court then stated it would address, in a follow-up opinion, other remaining jurisdictional questions, including the merits of two of the defendants' arguments: fraudulent joinder, and federal officer removal. The Court had to resolve these remaining jurisdictional issues in order to determine whether it had jurisdiction over: (1) the "43 Mississippi cases;"[1] (2) Orr, Maples, and Acy;[2] and

[1] The 43 Mississippi cases are listed in the appendix to this Order.

[2] 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. In the First Remand Order, the Court ruled that "the defendants filed their notices of removal [in these three cases] 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." First Remand Order at 8. The defendants, however, filed amended notices of removal asserting diversity jurisdiction and fraudulent joinder. The Court deferred addressing these issues until now.

(3) the "seven Louisiana cases."[3]

This is the promised follow-up opinion, which takes up where the First Remand Order left off. For the reasons explained below, the Court now concludes as follows:

* The motions to remand in the 43 Mississippi cases are all **GRANTED**, and these cases (and their constituent cases [4]) are all **REMANDED** to the Mississippi state courts where they were originally filed;

* The motions to remand in Orr, Maples, and Acy are all **GRANTED**, and these cases (and their constituent cases) are all **REMANDED** to the Mississippi state courts where they were originally filed; and

* The motions to remand in the seven Louisiana cases are all **DENIED**, and the Court retains jurisdiction over these cases (and their constituent cases).

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[3] The seven Louisiana cases include: (1) Anselmo v. Nichols Wire, Inc., case no. 03-CV-17011; (2) Johnson v. Nichols Wire, Inc., case no. 03-CV-17012; (3) Perrin v. Nichols Wire, Inc., case no. 03-CV-17013; (4) Backus v. Nichols Wire, Inc., case no. 03 -CV-17014; (5) Smith v. Nichols Wire, Inc., case no. 03-CV-17015; (6) Landry v. Nichols Wire, Inc., case no. 03-CV-17016; and (7) Frederick v. Nichols Wire, Inc., case no. 03-CV-17036. Although the Louisiana federal district court (transferor court) consolidated all seven of these cases with Weathersby v. Lincoln Elec. Co., case no. 03-CV-18494, before the cases were transferred to this Court by the MDL Panel, no motion to remand was ever filed in Weathersby. Thus, Weathersby is **NOT** remanded.

[4] As to many of the removed cases referred to in this Opinion (and also in the First Remand Order), when they were originally filed in State court, 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, this Court 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." See, e.g., Evans v. Lincoln Elec. Co., case no. 03-CV-17056, docket no. 2 at 2 (Nov. 20, 2003) (emphasis in original) (severing the original Evans case into 32 constituent cases, including the original case as well as 31 others, numbered 03-CV-17609 through 03-CV-17639, inclusive); see Fed. R. Civ. P. 21. Thus, the Court's remands of any of these removed cases to State court actually applies also to **all of the constituent severed cases**. The Court makes clear that its severance of the original State court cases into a number of constituent cases was purely for federal administrative purposes, and is in no way binding in any way upon any State court.

I. Fraudulent Joinder in the Mississippi Cases.

In the 43 Mississippi cases, and also in Orr, Maples, and Acy (the three of which were also originally filed in Mississippi state court), the plaintiffs are residents of Mississippi, while the named defendants are residents of various states, including Mississippi. Given that some plaintiffs share the same state of residency with some defendants in each case, diversity of citizenship is apparently not complete; the faces of the complaints suggest this Court cannot exercise diversity jurisdiction.

Nevertheless, the diverse defendants filed notices of removal, asserting that removal was proper, despite the apparent lack of complete diversity, because the Mississippi defendants "have been fraudulently joined as defendants to defeat removal jurisdiction." See, e.g., Campbell v. Lincoln Elec. Co., notice of removal at ¶3. Specifically, the removing defendants explain that: (1) the plaintiffs claim that all of the defendants are sellers of defective welding products, id. at ¶2; (2) all of the defendants who are citizens of Mississippi are merely distributors of these welding products, as opposed to manufacturers, id. at ¶4; and (3) the Mississippi distributors "

> had no knowledge or reason to know at any relevant time of the dangers associated with [the allegedly defective welding products.], id at ¶5. The defendants conclude: "[t]he plaintiff[s] thus ha[ve] no possibility of recovery against the Mississippi distributors under Mississippi law, and the citizenship of the Mississippi distributors therefore should be disregarded for diversity purposes." Id.

A. Legal Standards

The Sixth Circuit Court of Appeals has recognized that "fraudulent joinder of non-diverse defendants will not defeat removal on diversity grounds." Coyne v. American Tobacco Co., 183 F.3d 488, 493 (6th Cir. 1999) (citing Alexander v. Electronic Data Sys. Corp., 13 F.3d 940, 949 (6th Cir. 1994)); accord Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1287 (11th Cir. 1998) (noting that "[f]raudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity"). To prove fraudulent joinder, however, the removing party must present sufficient evidence that a plaintiff cannot establish a cause of action against the non-diverse defendants under state law. Alexander, 13 F.3d at 949. "When a non-diverse party has been joined as a defendant, then in the absence of a substantial federal question the removing defendant may avoid remand only by demonstrating that the non-diverse party was fraudulently joined." Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C., 176 F.3d 904, 907 (6th Cir. 1999) (quoting Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3rd Cir. 1992)). In attempting to make this demonstration, "a removing party is allowed to present evidence to prove that the plaintiff does not have a colorable basis for recovery against the non-diverse defendants." City of Jackson, Tennessee v. Martty Golf Management, Inc., 2002 WL 1398542 at *2 (W.D. Tenn. Apr. 23, 2002); see RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1135 (6th Cir. 1996) ("on a Rule 12(b)(1) challenge to subject matter jurisdiction, the court is empowered to resolve factual disputes"). That the parties may present jurisdictional evidence means "the district court can employ a summary judgment-like procedure that allows it to pierce the pleadings and examine affidavits and deposition testimony for evidence of fraud or the possibility that the plaintiff can state a claim under state law against a nondiverse defendant." Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 311 (5th Cir. 2002).

Under the doctrine of fraudulent joinder, the inquiry is whether the plaintiff has stated "at least a colorable cause of action against [the defendants] in the [Mississippi] state courts. Jerome-Duncan, 176 F.3d at 907; see Alexander v. Electronic Data Sys. Corp., 13 F.3d 940, 949 (6th Cir. 1994) ("[t]here can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged or on the facts in view of the law"). "[I]f there is a colorable basis for predicting that a plaintiff may recover against non-diverse defendants, [the] Court must remand the action to state court." Coyne, 183 F.3d at 493. Put differently, "the question is whether there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved." Alexander, 13 F.3d at 949 (quoting Bobby Jones Garden Apartments, Inc. v. Suleski, 391 F.2d 172, 176 (5th Cir. 1968)).

The removing party bears the burden of demonstrating fraudulent joinder, Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 330 (6th Cir. 1989), and removal statutes must be strictly construed, Wilson v. U.S. Dept. of Agriculture, 584 F.2d 137, 142 (6th Cir. 1978). Thus, the "burden of persuasion placed upon those who cry 'fraudulent joinder' is indeed a heavy one." Fields v. Reichenberg, 643 F. Supp. 777, 779 (N.D. Ill. 1986); see id. ("In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts") (emphasis in original). The plaintiff's motive in joining a non-diverse defendant "is immaterial to [the] determination regarding fraudulent joinder." Jerome-Duncan, 176 F.3d at 907; see also Harris v. Great Lakes Steel Corp., 752 F. Supp. 244, 246 n.4 (E.D. Mich. 1990) ("[t]he proper inquiry is whether there is any reasonable basis for asserting a claim against a defendant, not whether the plaintiff's motive in joining a defendant is to destroy diversity"). Similarly,

whether the plaintiffs will ultimately recover against the removing defendants is also immaterial. See Great Northern Ry. Co. v. Alexander, 246 U.S. 276, 282 (1918) ("whether such a case non-removable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits . . . order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses"). The Court must resolve "all disputed questions of fact and ambiguities in the controlling . . . state law in favor of the non-removing party." Coyne, 183 F.3d at 493.

B. Analysis.

The plaintiffs make two arguments in response to the defendants' assertion that none of the distributor defendants had any knowledge or reason to know of the dangers associated with the allegedly defective welding products. First, the plaintiffs argue that, in fact, one of more of the distributor defendants did have, at the least, reason to know of the dangerous nature of the welding rods. In particular, the plaintiffs focus on defendant Nordan Smith,[5] one of the largest distributors of welding products in Mississippi and other gulf coast states. The plaintiffs present evidence showing that Nordan Smith has promoted itself as a leader in product safety awareness and provision of product safety training to its customers. Plaintiffs argue that, if Nordan Smith claims leadership in obtaining and conveying knowledge regarding the safety of welding products, it "should have known" of the danger that manganese contained in the fumes given off by welding rods can cause, and has caused, serious physical harm to product users.

[5] Each one of the Mississippi cases names as a defendant Industrial Welding Supplies of Hattiesburg, Inc. d/b/a Nordan Smith.

The second argument made by plaintiffs is that the then-applicable Mississippi product liability law does not even require them to show the distributor defendants knew or had reason to know that the welding products were dangerous. The plaintiffs argue that the relevant Mississippi law allows for imposition of liability on a seller of a defective product, even if the seller did not know or have reason to know of the defect. The plaintiffs insist that the distributor defendants' mere sale of defective welding products is enough.

As noted above, the Court's task is not to provide an authoritative answer whether the plaintiffs will ultimately prevail on the merits of their claims against the Mississippi distributor defendants. Rather, the Court must simply determine whether the plaintiffs provide a colorable, non-fraudulent basis for recovery against any of these non-diverse parties. The Court concludes the plaintiffs have done so, and the defendants have not carried their burden of persuasion of showing "there is no possibility that the plaintiff [will] establish a cause of action against the in-state defendant in state court." Reichenberg, 643 F. Supp. at 779 (emphasis in original). Because the plaintiffs' first argument (that the distributor defendants should have known of the alleged product defect) is sufficient, the Court does not fully address the second argument (that Mississippi law

does not require the distributor to have knowledge of the defect).[6]

As to the plaintiffs' first argument, the defendants respond that "[t]he Mississippi distributor defendants in this case have all provided sworn discovery responses confirming that they had no knowledge or reason to know of any alleged neurological dangers associated with welding consumables other than those that are warned against in publicly available materials provided with the consumables themselves." Brief in opp. at 27. The defendants even insist that this sworn testimony is "unrefuted." The Court is left unimpressed, however, with the evidence suggesting that no distributor had reason to know of the dangers of using welding rods. Nordan Smith, for example, offers two discovery responses that supposedly prove the plaintiffs cannot possibly prevail against it. First, a co-defendant asked Nordan Smith to "admit that, prior to the time that you were first served with a complaint in the Mississippi welding rod litigation, you had no knowledge of information suggesting that welding fumes could cause neurological injury." Dantzler request for admission 3. Nordan Smith conceded the truth of this statement. Nordan Smith also gave the following answer to a similar

[6] The Court does note, however, that the plaintiffs' second argument also appears to have at least some merit. As one commentator, who has been quoted approvingly at least three times by Mississippi appellate courts, has noted, the Mississippi product liability statute is "ambiguous," leaving open "a choice between two reasonable, but competing policies." Phillip L. McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, 312 (1997). In particular, the statute as written forces a court either "to impose strict liability on the seller for all defects that occur upstream in the chain of distribution or while the product is under the seller's control, or [instead] . . to impose liability solely on the basis of seller fault for design and warnings defects." Id. Eventually, after the plaintiffs in the instant Mississippi cases filed suit, the legislature amended the statute, choosing the latter interpretation. See Miss. Code Ann. §11-1-64(3) (2003) (liability may not be imposed on a seller based only on "his status as a seller in the stream of commerce"). That the legislature amended the statute suggests that, in fact, the law in effect when the plaintiffs filed suit did allow recovery against a distributor premised on strict liability for a defect that occurred "upstream," even if the distributor did not know or have reason to know of the defect. Thus, plaintiffs' second argument also suggests the Mississippi distributors were not fraudulently joined.

interrogatory, which was posed by the same co-defendant:

> Interrogatory No. 2.
>
> If you contend that you knew, prior to the date that you were first served with a complaint in the Mississippi welding rod litigation, that inhalation of welding fumes presented a danger of neurological injury, please describe all sources of information from which you obtained such knowledge, the dates when such knowledge was obtained, and specify the extent of such knowledge.
>
> Answer:
>
> No sources of information are known to have provided Industrial Welding Supplies of Hattiesburg, Inc. d/b/a Nordan Smith with information concerning dangers of neurological injury from welding fumes except material safety data sheets and warning labels that may have accompanied products sold by Nordan Smith.

Dantzler answer to interrogatory no. 2.

As an initial matter, if a defendant could prove there is "no possibility" that the plaintiff could prevail, merely by conceding a co-defendant's request for admission that there exists no basis for liability, then court dockets would be either dramatically lighter (co-defendants would always avoid liability using this tactic) or dramatically heavier (plaintiffs would never sue two defendants in the same lawsuit). Simply, these two discovery responses are not forged in the heat of true confrontation and do not conclusively prove the fact that Nordan Smith really and truly did not have knowledge or reason to know of welding fume dangers. Courts have warned that the burden of proving fraudulent joinder is a "heavy one," Reichenberg, 643 F. Supp. at 779, and Nordan Smith's conclusory discovery responses, alone, do not shoulder the load.

Further, even were the Court to accept Nordan Smith's discovery responses as entirely true, and even if they were supplemented by an affidavit to the same effect, this evidence still only stands (at best) for the proposition that Nordan Smith had no actual knowledge that the manganese in welding fumes could cause neurological injury. A careful reading reveals that neither of these discovery responses asserts that Nordan

Smith had no reason to know that welding fumes could cause neurological injury. Yet the plaintiffs provide a non-frivolous depiction of evidence and inferences to support their claim that Nordan Smith did have reason to know – there were documents available to industry participants showing the dangers of welding rods, and Nordan Smith was a large distributor in the business of conveying knowledge about the safety of the welding products it sold. Given the evidence presented so far by both sides, this Court cannot say that no reasonable jury following Mississippi law could possibly conclude one or more of the Mississippi distributor defendants "knew or in light of reasonably available knowledge should have known about the danger that caused the damage for which recovery is sought and that the ordinary user or consumer would not realize its dangerous condition." Miss. Code Ann. §11-1-63(c)(i). In sum, the defendants have not shown that every non-diverse distributor defendant was fraudulently joined.

The Court ends this part of its analysis with two observations. First, it is worth repeating that the test for fraudulent joinder is not whether this Court believes the plaintiffs will actually succeed in court and ultimately prevail against the Mississippi distributor defendants on the merits of their claims. Rather, the test is whether the plaintiffs have stated a colorable cause of action against the non-diverse defendants. In light of the arguments and evidence adduced by the plaintiffs in their remand briefs and at oral argument, the claims against the distributor defendants are not so baseless or insufficiently grounded as to be devoid of color. Having met this evidentiary threshold, the plaintiffs' motions to remand must be granted.

Second, the Court has carefully compared the circumstances presented in this case to those presented in other mass tort cases finding fraudulent joinder, and finds them substantially and meaningfully different. For example, in In re Rezulin Products Liab. Litig., 133 F.Supp.2d 272 (S.D.N.Y. 2001), the Mississippi plaintiffs alleged they were harmed by their diabetes medication and sued the manufacturer, their pharmacies, their

physicians, and others. While there was diversity of citizenship between the manufacturer and the plaintiffs, diversity was lacking between the plaintiffs and their pharmacies and physicians. The defendants removed the cases to federal courts, asserting fraudulent joinder of the non-diverse parties, and the plaintiffs moved for remand. The Rezulin court noted that the "the theory underlying the complaints is that the manufacturer defendants hid the dangers of Rezulin from plaintiffs, the public, physicians, distributors, and pharmacists – indeed, from everyone. Plaintiffs' allegations that pharmacists knew and failed to warn of the dangers therefore are purely tendentious." Id. at 290. The Rezulin court also noted that the plaintiffs made "no allegations specifically against the defendant pharmacies, but instead lump[ed] them together with the manufacturers and attribute the acts alleged – failure to warn, breach of warranty, and fraud – to the 'defendants' generally." Id. at 291. Because the plaintiffs' own theory of the case was that the manufacturers had successfully hidden the dangers of Rezulin even from the other defendants, the court found the non-diverse defendants were fraudulently joined, and denied remand.

In this case, the plaintiffs have, to some extent, "lumped together" the manufacturer defendants with the distributor defendants. But the critical difference is that the plaintiffs' fundamental legal theory is that both the manufacturer and distributor defendants knew, or had reason to know, of the dangers of welding rod fumes, and both the manufacturers and distributors may even have worked together to hide those dangers. And, as noted above, the plaintiffs present non-frivolous, tinctured arguments and evidence in support of this theory. It is this case-specific factual circumstance that also distinguishes the instant situation from the other mass tort cases where courts found fraudulent joinder. Cf. Coyne v. American Tobacco Co., 183 F.3d 488, (6th Cir. 1999) (no colorable allegation or argument that " the wholesalers and retailers knew of the so-called nicotine defect any sooner than members of the general public"); Walker v. Philip Morris Inc., 2003 WL

21914056 at *6 (E.D. La. Aug. 8, 2003) (evidence was undisputed that "the distributor defendants . . . never received information concerning the health risks associated with smoking . . . aside from that generally available to smokers and the public at large"); In re Sulzer Hip Prosthesis and Knee Prosthesis Liab. Litig., case no. 01-CV-9000, slip op. at *4 (N.D. Ohio June 12, 2003) (O'Malley, J.) (docket no.451) ("[Plaintiff] does not argue that [his doctor-defendant] had anything to do with designing, manufacturing, distributing, selling, labeling, or providing warranties regarding the hip implant. Indeed, [plaintiff] does not allege that [the doctor] knew or should have known, or even could have known, of a defect in the hip prosthesis; to the contrary, [plaintiff] alleges the [manufacturer defendants] failed to warn surgeons and physicians, including [plaintiff's doctor], about the dangers of the product.").

In sum, the plaintiffs in the 43 Mississippi cases, and also Orr, Maples, and Acy, have stated at least one colorable cause of action against one or more of the non-diverse defendants. Accordingly, these cases must all be remanded back to the Mississippi state courts where they were originally filed.

II. The Federal Officer Defense in the Louisiana Cases.

In all seven of the Louisiana cases, the defendants assert two bases for federal removal jurisdiction: (1) fraudulent joinder and diversity jurisdiction, pursuant to 28 U.S.C. §1332(a)(1); and (2) federal officer jurisdiction, pursuant to 28 U.S.C. §1442(a)(1). If the Court concludes that either of the two jurisdictional bases are present, then the motions to remand in the Louisiana cases must be denied. (None of the Louisiana cases present questions regarding the timeliness of the defendants' filing of the removal notice, nor the timeliness of the plaintiffs' filing of the motion to remand.)

The defendants' first assertion regarding jurisdiction over the seven Louisiana cases is essentially

identical to their jurisdictional assertion in the Mississippi cases, discussed above. That is, the defendants assert that the plaintiffs fraudulently joined all of the non-diverse Louisiana defendants solely for the purpose of defeating removal jurisdiction.[7]

The defendants' second assertion regarding jurisdiction over the Louisiana cases is that one or more of the defendants was acting "under color of [federal] office" when it undertook the acts that allegedly injured the plaintiffs, and thus has a "colorable federal defense" to the plaintiffs' claims. Because the Court finds that examination of this second assertion, alone, fully resolves the question of whether the Court has jurisdiction over the seven Louisiana cases, the Court does not examine the first assertion.

A. Legal Standards.

1. Federal Officer Removal.

The authorization by Congress of removal under 28 U.S.C. §1442(a)(1) is "meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties." Arizona v. Manypenny, 451 U.S. 232, 241 (1981). Removal of the action, along with the federal-law defense, from state court to federal court "enables the defendant to have the validity of his immunity defense adjudicated, in a federal forum." Id. (citing Willingham v. Morgan, 395 U.S. 402, 407 (1969)). The Supreme Court has long warned that "[t]he federal officer removal statute is not 'narrow' or 'limited.'" Willingham, 395 U.S. at 406 (citing Colorado v. Symes, 286 U.S. 510, 517 (1932)). Rather, the "the right of removal is absolute for

[7] The similarity of the defendants' jurisdictional arguments in the Mississippi and Louisiana cases does not necessarily mean the jurisdictional result must be the same, however, as Mississippi and Louisiana state law are different.

conduct performed under color of federal office, and [the Supreme Court] has insisted that the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of §1442(a)(1).'" Manypenny, 451 U.S. at 241 (quoting Willingham, 395 U.S. at 407). At the same time, "the invocation of removal jurisdiction by a federal officer does not revise or alter the underlying law to be applied. In this respect, it is a purely derivative form of jurisdiction, neither enlarging nor contracting the rights of the parties." Id.

To establish removal jurisdiction under section 1442(a)(1), a defendant must establish that: "(1) it is a 'person' within the meaning of the statute; (2) the plaintiff's claims are based upon the defendant's conduct 'acting under' a federal office; (3) it raises a colorable federal defense; and (4) there is a causal nexus between the claims and the conduct performed under color of a federal office. Feidt v. Owens Corning Fiberglas Corp., 153 F.3d 124, 127 (3rd Cir. 1998) (citing Mesa v. California, 489 U.S. 121, 129 (1989), and Willingham, 395 U.S. at 409).

2. The Military Contractor Defense.

In none of the seven Louisiana cases is a federal officer, or a federal governmental entity, named as a defendant. The federal officer removal statute, however, "permits a federal officer, or person acting under such an officer, to remove to federal court any action brought against him in state court for conduct performed under federal direction." Feidt, 153 F.3d at 127 (emphasis added). In this case, the manufacturing defendants assert that federal officer removal is appropriate because they were: (1) acting in their role as federal military contractors when they provided the allegedly defective welding rods to the plaintiffs, and (2) acting under federal direction during manufacture. Specifically, the defendants assert that, in all seven Louisiana cases, "at least one plaintiff's alleged exposure to manganese-containing welding fumes was

attributable to welding consumables whose development and production was subject to detailed government specifications because of their use in the construction of U.S. Navy vessels at either the Ingalls shipyard in Mississippi or the Avondale Shipyard in Louisiana." Brief in opp. at 3. The manufacturing defendants argue that, given their collective role as a federal military contractor, they are clothed with the same immunity the government enjoys.

In Boyle v. United Technologies Corp., 487 U.S. 500 (1988), the Supreme Court examined the viability of the "military contractor defense," id. at 503, which previously had been recognized by several Courts of Appeal, though with different formulations, id. at 512-13. The Supreme Court ultimately reached "the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." Id. at 512. Accordingly, the "Boyle Court held that, under certain circumstances, government contractors are immune from state tort liability for design defects in military equipment." Tate v. Boeing Helicopters, 55 F.3d 1150, 1153 (6th Cir. 1995). To escape liability under state law for design defects in military equipment on the basis of the military contractor defense, the contractor must establish three conditions: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." Boyle, 487 U.S. at 512.

The Supreme Court was careful to note that the military contractor defense will not prevail unless there is a "significant conflict" between the state law imposing tort liability and the federal policy or interest identified by the defendant. Id. at 507. The Court explained:

If, for example, the United States contracts for the purchase and installation of an air

> conditioning-unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context.

Id. at 509. The Court further explained that the necessary "significant conflict" could arise if the government – as opposed to the military contractor – undertakes its "discretionary function," by "select[ing] the appropriate design for military equipment to be used by our Armed Forces," and then directs the contractor to provide the equipment as designed. Id. at 511. Thus, the three-pronged formulation of the military contractor defense set out in Boyle "assure[s] that the design feature in question was considered by a Government officer, and not merely by the contractor itself." Id. at 512; see Landgraf v. McDonnell Douglas Helicopter Co., 993 F.2d 558, 560 (6th Cir. 1993) ("[t]he three conditions serve to ensure that the defense operates to immunize the contractor only where the government has actually participated in discretionary design decisions, either by designing a product itself or approving specifications prepared by the contractor") (quoting Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1316 (11th Cir. 1989), cert. denied, 494 U.S. 1030 (1990)). It is only when the government participated in discretionary design decisions "that the [defendant military] contractor shares the government's immunity." Landgraf, 993 F.2d at 560.

The question of precisely what the government had to do before it could be said to "participate[] in discretionary design decisions" concerned even the dissenting Justices in Boyle. Justice Brennan, examining the first prong of the military contractor defense – that the United States had to "approve[] reasonably precise specifications" – was concerned that governmental approval might be "no more than a rubber stamp from a federal procurement officer who might or might not have noticed or cared about the [alleged] defects, or even

had the expertise to discover them." Boyle, 487 U.S. at 515 (Brennan, J., dissenting). Taking their cue from Justice Brennan's warning, however, federal appellate courts have held that "[t]he government exercises no discretion when it simply approves a design with a rubber stamp, that is, approves a design without scrutiny." Tate, 55 F.3d at 1154 (citing cases). "When the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion. Id. (quoting Trevino v. General Dynamics Corp., 865 F.2d 1474, 1480 (5th Cir.), cert. denied, 493 U.S. 935 (1989). Thus, to determine whether the first condition of the military contractor defense has been satisfied, courts will often examine whether "the government and the contractor engage[d] in a continuous back and forth review process regarding the design in question." Id. (internal quotation marks and citation omitted).

Finally, the Sixth Circuit has explicitly noted that, "[i]n the government contractor defense context, design defect and failure to warn claims differ practically as well as theoretically. Simply because the government exercises discretion in approving a design does not mean that the government considered the appropriate warnings, if any, that should accompany the product." Tate, 55 F.3d at 1156. Thus, a defendant's "success in establishing the government contractor defense against [a] design defect claim does not by itself establish a defense to the plaintiffs' failure to warn claim." Id. The Tate court set out a modified Boyle test for whether the military contractor defense will prevail in a failure-to-warn case:

> When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not.

Id. at 1157. Once again, "the government's involvement must transcend [mere] rubber stamping" of the warning; on the other hand, however, only "[g]overnment discretion is required, not dictation or prohibition of warnings. Where a contractor proposes warnings that the government substantively approves, and satisfies the second and third conditions, the defense displaces state law – even if the government did not 'prohibit' the contractor from proposing more alarming warnings." Id. (emphasis in original).[8]

B. Analysis.

Just as the Court, when it assessed above the defendants' jurisdictional assertion of fraudulent joinder, merely gauged whether the plaintiffs' claims against the non-diverse Mississippi distributor defendants were colorable – not whether these claims would ultimately succeed – the Court now gauges only whether the

[8] In Tate, the Sixth Circuit expressly rejected portions of the reasoning of its sister appellate courts, "not[ing] that some of the cases decided in other circuits applying the government contractor defense to failure to warn claims may require a higher level of government involvement than we think is required." Tate, 55 F.3d at 1157. It is generally incumbent upon this Court, of course, to follow the law as set out in Tate, regardless of whence were transferred the MDL cases in which the defendants raise their military contractor defense. See In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 256 F. Supp.2d 884, 888 (S.D. Ind. 2003) ("the law of the circuit where the transferee court sits governs questions of federal law in MDL proceedings"); In re Diet Drugs Prods. Liab. Litig., 220 F.Supp.2d 414, 423 (E.D. Pa. 2002) ("[a]s an MDL court sitting within the Third Circuit, we must apply our Court of Appeals' fraudulent joinder standard"); In re Temporomandibular Joint Implants Prod. Liab. Litig., 97 F.3d 1050, 1055 (8th Cir. 1996) ("[w]hen analyzing questions of federal law, the [MDL] transferee court should apply the law of the circuit in which it is located"); Menowitz v. Brown, 991 F.2d 36, 40 (2nd Cir. 1993) ("a transferee federal court should apply its interpretations of federal law, not the constructions of federal law of the transferor circuit"); In re Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir.1987) ("the law of a transferor forum on a federal question . . . merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit"). Compare In re Cardizem CD Antitrust Litig., 332 F.3d 896, 912 n.17 (6th Cir. 2003) ("in a federal multidistrict litigation there is a preference for applying the law of the transferee district, [but] it is not clear that precedent 'unique' to a particular circuit and arguably divergent from the predominant interpretation of a federal law . . . should be applied to . . . claims that originated in other circuits").

defendants invoke a colorable federal defense, and not whether this defense will ultimately prevail. Another court summarized the procedural posture this way: "Defendants must do more than simply plead a federal defense. Rather, Defendants must plead a colorable federal defense. Nevertheless, in determining whether a federal defense is 'colorable' for jurisdictional determination, a court should not delve into 'the validity of the defense' which 'is a distinct subject' and 'involves wholly different inquiries' apart from jurisdictional determination." Faulk v. Owens-Corning Fiberglass Corp., 48 F. Supp.2d 653, 664 (E.D. Tex. 1999) (emphasis in original, footnote omitted).

Here, the ultimate inquiry largely reduces to the question of whether the United States approved reasonably precise specifications regarding the welding rods manufactured by the defendants, and/or the warnings attached to the welding rods. That is, there is no dispute regarding the first and fourth prongs of federal officer removal jurisdiction under §1442(a)(1): the defendants are clearly "persons" within the meaning of the statute, and the plaintiffs have alleged a causal nexus between their claims (e.g., failure to warn of the dangers of manganese fumes) and the defendants' conduct (manufacturing government-specification-compliant welding products that off-gas harmful manganese fumes, and not providing adequate warnings). The parties disagree, however, whether the plaintiff's claims are based upon the defendant's conduct "acting under" a federal office, and whether the defendants raise a colorable federal defense – the third and fourth prongs of federal officer removal jurisdiction. The third prong is itself largely subsumed under the first two elements of the military contractor defense: whether the United States approved reasonably precise specifications, and the equipment conformed to those specifications.

In other words, if the federal government did demand or heedfully approve reasonably precise specifications for (or warnings about) the welding rods manufactured by the defendants, and the defendants

did conform to those specifications, then it is fair, for jurisdictional purposes only, to conclude that the defendants were acting under federal office.

To show that they were, in fact, complying with precise federal requirements when they manufactured the welding rods at issue in this case, the defendants muster numerous affidavits and reams of exhibits. The affidavits attest that the United States Navy conducts extensive research on welding materials to ensure they meet the particular requirements of combat vessels. The affidavits further attest that the Navy's Naval Sea Systems Command ("NAVSEA") develops lengthy and precise military specifications, known as "MIL specs," that govern the welding products manufactured by the defendants. The defendants provide affidavits and exhibits which, they claim, evidence the Navy's tight control over almost every aspect of the welding rods obtained from the defendants, including "chemical composition requirements, mechanical property requirements (such as yield strength, tensile strength, elongation, and notch toughness), diffusible hydrogen levels, process quality control, production testing, lot testing, and packaging and shipping requirements." Brief in opp. at 6. The defendants take special pains to note that "NAVSEA's MIL specs often specify both a minimum and maximum manganese content for different welding consumables." Id. The defendants attest that, in fact, the MIL specs actually "force manufacturers to have two distinct formulations for their [welding products known as] covered electrodes – one [formulation] for AWS [American Welding Society] specifications [which apply to commercial welding rods,] and one for the military." Id. at 7. The defendants also aver that the Navy generates MIL specs prescribing use of specific warning language explaining the dangers of welding rods, including the warning that adequate ventilation and exhaust is important because fumes and gases given off during welding can be dangerous to the user's health. The defendants point to the sum of this evidence and conclude there can be no question but that federal jurisdiction exists because they

have a valid military contractor defense. Essentially, the defendants argue that the facts going to the gravamen of the plaintiffs' claims – the amount of manganese contained in a welding rod, and the warning language about the danger of manganese fumes – were virtually dictated to them by the government.

In response to this evidence, the plaintiffs scoff and accuse the defendants of concealing evidence, "seek[ing] to mislead the Court." Reply at 2. The plaintiffs insist the truth of the matter is that the defendants dictated the MIL Specs to the Navy. The plaintiffs point to evidence showing that the defendants' non-military, commercial welding rod products, which were already available on the open market, satisfied the Navy's MIL specs – there is no difference between the welding rods the defendants manufacture for the Navy and those it manufactures for any other consumer. The plaintiffs also adduce evidence showing that: (1) the MIL specs are very frequently the same or less stringent than the specifications promulgated by the American Welding Society ("AWS"), which govern non-military, commercially available welding products; and (2) the products manufactured for commercial use by the defendants routinely exceed the AWS specifications, and thus routinely exceed or easily meet the Navy's specifications. In sum, the plaintiffs insist that "[t]he Navy did not approach the manufacturing defendants to initiate the manufacture of unique, military-only-use welding rods." Motion at 12. Rather, the manufacturers "contacted the Navy to pre-qualify their [existing] welding rods for use in constructing Navy ships." Id.

Further, the plaintiffs also set out evidence which, they claim, shows that it was actually the defendants that dictated the contents of the warning labels later specified by the Navy. The plaintiffs note that the warnings specified by the Navy in its MIL specs "were all predated by the identical warning label wording accepted by the American Welding Society." Id. at 13. The plaintiffs insist that "the military did not develop, in whole or even in part, welding rod warning labels but merely relied on the language of existing warning labels. The

industry itself originated the wording. The ANSI standards, adopted from the industry, and subsequently adopted by the Navy, were minimum standards." Id. at 14. The plaintiffs conclude that this evidence shows that the federal government did not use its discretion to "select the appropriate design for military equipment," the defendants did not act under federal direction, and there is no causal nexus between the plaintiffs' claims and any conduct performed by the defendants under color of a federal office.

The plaintiffs make some cogent points; the evidence so far adduced certainly brings into question whether "the government and the [defendant] contractor[s] [ever] engage[d] in a continuous back and forth review process regarding the design [or warnings] in question." Tate, 55 F.3d at 1154 (internal quotation marks and citation omitted). But the ultimate answer to the question of who (if anyone) dictated what to whom, and the question of whether the military contractor defense prevails on the merits, is not material at this juncture. The Court is faced only with the threshold jurisdictional inquiry of whether the military contractor defense is colorable. In light of the arguments and evidence adduced by the defendants in their remand briefs and at oral argument, the Court concludes that the military contractor defense is not so insufficiently grounded as to be devoid of color.

This is not a case where the federal shield that the defendants seek to raise is simply the presence of federal oversight. In Little v. Purdue Pharma, L.P., 227 F.Supp.2d 838 (S.D. Ohio 2002), for example, the defendant argued that federal officer removal was appropriate because the drugs it manufactured were subject to comprehensive federal regulations. The Little court noted that this argument was too easy: "Lest participants in every regulated industry be entitled to 'federal officer' status, corporate Defendants need to make a much greater showing that in doing the acts giving rise to Plaintiffs' claims, they were acting pursuant to a federal directive. Acting under the watchful eye of the federal government is not enough." Id. at 861. Rather, the

Little court found, federal officer removal is only appropriate if the defendant is "operating under the terms of a federal contract, and thus the operative contractual commands of federal officials." Id. In the instant case, the manufacturer defendants have adduced evidence that the welding rods they sold to the Navy, pursuant to contract, had to meet specifications promulgated by the Navy. The basis for the defendants' federal defense in this case is not mere "regulation," and the evidence offered by the defendants does give color to their jurisdictional arguments.

Nor is this a case where the federal specifications and contracts at issue are completely silent on the questions central to liability. In Faulk v. Owens-Corning Fiberglass Corp., 48 F. Supp.2d 653 (E.D. Tex. 1999), for example, the defendant argued that federal officer removal jurisdiction existed because it had contracted with the government to produce certain products, and those products had to comply with certain precise specifications. The plaintiffs' claim, however, was that they were injured by the asbestos present at the facilities where the products were manufactured – not that they were injured by the actual products, themselves, which the defendant had manufactured in compliance with a federal officer's specifications. The Faulk court concluded that remand was appropriate because there existed no causal nexus: "the product whose manufacture was arguably 'controlled' by the federal government is not the product allegedly causing injury to the Plaintiffs." Id. at 662. In this case, however, the MIL specs provided by the defendants speak directly to the precise aspects of the welding rods that the plaintiffs allege caused their injury – the manganese content and warning labels. The factual basis for the defendants' military contractor defense is not so anemic that there is only a tenuous connection between the defendants' "federally-colored" conduct and the plaintiffs' claims.

In sum, 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.

IT IS SO ORDERED.

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

APPENDIX

The 43 Cases referred to in the Court's Order are listed in the following table.

	MDL Case Number	Original Case Number	Case Title	Transferor Court	Transfer Date	Conditional Transfer Order
1	1:03-17018	5:03-260	Wilson v Lincoln Electric Co.	MSS	8/29/03	CTO-2
2	1:03-17019	5:03-261	Jackson v Lincoln Electric Co.	MSS	8/29/03	CTO-2
3	1:03-17020	5:03-389	Campbell v Lincoln Electric Co.	MSS	8/29/03	CTO-2
4	1:03-17039	1:02-659	Smith v Lincoln Electric Co.	MSS	9/30/03	CTO-3
5	1:03-17040	1:03-660	Allen v Lincoln Electric Co.	MSS	9/30/03	CTO-3
6	1:03-17041	1:03-661	Anglin v Lincoln Electric Co.	MSS	9/30/03	CTO-3
7	1:03-17042	1:03-662	Broughton v Lincoln Electric Co.	MSS	9/30/03	CTO-3
8	1:03-17043	1:03-663	Maye v Lincoln Electric Co.	MSS	9/30/03	CTO-3
9	1:03-17044	2:03-390	Dearmon v Lincoln Electric Co.	MSS	9/30/03	CTO-3
10	1:03-17045	2:03-396	Bates v Lincoln Electric Co.	MSS	9/30/03	CTO-3
11	1:03-17046	2:03-398	Barnes v Lincoln Electric Co.	MSS	9/30/03	CTO-3
12	1:03-17048	3:03-467	Burrell v Lincoln Electric Co.	MSS	9/30/03	CTO-3
13	1:03-17049	3:03-918	Dubose v Lincoln Electric Co.	MSS	9/30/03	CTO-3
14	1:03-17050	3:03-919	Williams v Lincoln Electric Co.	MSS	9/30/03	CTO-3
15	1:03-17051	3:03-921	Blackmon v Lincoln Electric Co.	MSS	9/30/03	CTO-3
16	1:03-17052	3:03-922	Morris v Lincoln Electric Co.	MSS	9/30/03	CTO-3
17	1:03-17053	3:03-924	Edwards v Lincoln Electric Co.	MSS	9/30/03	CTO-3
18	1:03-17054	3:03-928	Presher v Lincoln Electric Co.	MSS	9/30/03	CTO-3
19	1:03-17055	3:03-929	Adams v Lincoln Electric Co.	MSS	9/30/03	CTO-3
20	1:03-17056	4:03-180	Evans v Lincoln Electric Co.	MSS	9/30/03	CTO-3
21	1:03-17057	4:03-279	Bender v Lincoln Electric Co.	MSS	9/30/03	CTO-3
22	1:03-17058	4:03-280	Graham v Lincoln Electric Co.	MSS	9/30/03	CTO-3
23	1:03-17059	4:03-282	Mattix v Lincoln Electric Co.	MSS	9/30/03	CTO-3

	MDL Case Number	Original Case Number	Case Title	Transferor Court	Transfer Date	Conditional Transfer Order
24	1:03-17060	5:03-385	Shaifer v Lincoln Electric Co.	MSS	9/30/03	CTO-3
25	1:03-17061	5:03-386	Jackson v Lincoln Electric Co.	MSS	9/30/03	CTO-3
26	1:03-17062	5:03-387	Johnson v Lincoln Electric Co.	MSS	9/30/03	CTO-3
27	1:03-17063	5:03-391	Carr v Lincoln Electric Co.	MSS	9/30/03	CTO-3
28	1:03-17064	5:03-392	Fife v Lincoln Electric Co.	MSS	9/30/03	CTO-3
29	1:03-17065	5:03-393	Beasley v Lincoln Electric Co.	MSS	9/30/03	CTO-3
30	1:03-17066	5:03-394	Banks v Lincoln Electric Co.	MSS	9/30/03	CTO-3
31	1:03-17067	5:03-395	Archer v Lincoln Electric Co.	MSS	9/30/03	CTO-3
32	1:03-17068	5:03-397	Armstrong v Lincoln Electric Co.	MSS	9/30/03	CTO-3
33	1:03-17069	5:03-399	Cadney v Lincoln Electric Co.	MSS	9/30/03	CTO-3
34	1:03-17070	5:03-400	Pickering v Lincoln Electric Co.	MSS	9/30/03	CTO-3
35	1:03-17071	5:03-401	Pickering v Lincoln Electric Co.	MSS	9/30/03	CTO-3
36	1:03-17072	5:03-402	Woods v Lincoln Electric Co.	MSS	9/30/03	CTO-3
37	1:03-17073	5:03-403	Kilcrease v Lincoln Electric Co.	MSS	9/30/03	CTO-3
38	1:03-17074	5:03-404	Mackey v Lincoln Electric Co.	MSS	9/30/03	CTO-3
39	1:03-17075	5:03-405	Stander v Lincoln Electric Co.	MSS	9/30/03	CTO-3
40	1:03-17076	5:03-406	Torrain v Lincoln Electric Co.	MSS	9/30/03	CTO-3
41	1:03-17077	5:03-407	Stringer v Lincoln Electric Co.	MSS	9/30/03	CTO-3
42	1:03-17078	5:03-408	Wells v Lincoln Electric Co.	MSS	9/30/03	CTO-3
43	1:03-17079	5:03-409	Wells v Lincoln Electric Co.	MSS	9/30/03	CTO-3

	MDL Case Number	Original Case Number	Case Title	Transferor Court	Transfer Date	Conditional Transfer Order