S:\03cv17000e-ord(remand-4-LouisianaFactual).wpd

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**
	:	

This Court earlier entered its Second Remand Order (docket no. 224) which addressed, among other things, whether seven cases originally filed in Louisiana state court were properly removed to federal court. The removing defendants in these seven Louisiana cases asserted two bases for federal 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)." Second Remand Order at 12. The Court ultimately concluded that "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." Id. at 23-24. Because the Court found it had federal officer jurisdiction over these Louisiana cases, it "did not examine" the defendants' fraudulent joinder argument. Id. at 13.

The parties agreed, where possible, to apply the Court's reasoning to other Louisiana cases in the MDL and stipulate to removal or remand. The parties also agreed, where stipulation was not possible, to identify those Louisiana cases where jurisdictional issues remained unresolved. Having abided by this

agreement, the parties now direct the Court's attention to 31 additional Louisiana cases which, the plaintiffs urge, are factually different from the seven Louisiana cases discussed in the Second Remand Order. See Exhibit A to this Order (listing the 31 Louisiana cases); see docket nos. 379, 606, 675 (parties' briefs discussing "factual challenges" to jurisdiction). Specifically, the plaintiffs in these 31 cases argue: (1) they were not injured while working on federal projects; (2) therefore, the defendants were not acting in their role as a federal military contractor when they provided the allegedly defective welding rods; and (3) accordingly, the defendants do not have a colorable federal officer defense to their claims. In other words, these 31 plaintiffs assert that the determinative jurisdictional facts present in the seven Louisiana cases discussed in the Second Remand Order are not present in their cases, so federal jurisdiction does not exist.

The defendants respond that: (1) as to each of the 31 plaintiffs, the alternative argument of fraudulent joinder, which the Court did not examine in the Second Remand Order, is meritorious; (2) even if the fraudulent joinder argument is unpersuasive, three of the 31 plaintiffs are simply wrong about the jurisdictional facts, so the federal officer defense is colorable in their case; and (3) for two of the 31 plaintiffs, there is yet a third alternative basis for federal jurisdiction – "federal enclave" jurisdiction.[1]

The Court now issues this Fourth Remand Order to resolve these arguments and, for the reasons stated below, finds as follows: (1) defendants' fraudulent joinder argument is not well-taken; (2) the federal

[1] When the jurisdictional briefing started, there were 60 Louisiana cases at issue. As briefing continued, the parties came to agreement regarding the propriety of federal jurisdiction in 29 cases, leaving the 31 cases addressed by this Order. Before reaching agreement, the parties had addressed a subcategory of federal enclave jurisdiction known as "Outer Continental Shelf" ("OCS") jurisdiction, which was relevant to five cases where plaintiffs had allegedly suffered welding fume exposure while working on offshore oil production platforms. See 43 U.S.C. §1349(b)(1) (setting out federal jurisdiction flowing from the Outer Continental Shelf Lands Act). The parties' mid-briefing agreement resolved all five of these cases, however, so the Court does not touch on OCS jurisdiction in this Order.

officer defense is well-taken as to plaintiff Buteaux, but not as to any other plaintiff; and (3) the federal enclave argument is well-taken as to plaintiff Buteaux, but not as to any other plaintiff. Thus, the motions to remand in these 31 Louisiana cases are all **GRANTED**, except as to plaintiff Buteaux, where the motion to remand is **DENIED**. The 30 cases where the Court grants the motions to remand are hereby **REMANDED** to the Louisiana state court where they were originally filed. See Exhibit A to this Order (summarizing the Court's rulings).

I.

If the Court concludes that any one of the several jurisdictional bases asserted by the defendants are present as to a given plaintiff, then the motion to remand pending in that plaintiff's case must be denied. The Court examines each of defendants' arguments below.

A. Fraudulent Joinder.

This Court has twice examined arguments made by the parties in this MDL regarding fraudulent joinder: (1) in the Second Remand Order, where the Court determined the plaintiffs' joinder of several non-diverse "distributor defendants" in a number of Mississippi cases was not fraudulent; and (2) the Third Remand Order (docket no. 807), where the Court determined the plaintiff's joinder of two non-diverse defendants in an Arkansas case was fraudulent. See Second Remand Order at 6-12; Third Remand Order at 6-18.

The primary distinguishing factor between these two Remand Orders was the extent to which the plaintiffs offered individualized allegations and/or evidence supporting the claims against the non-diverse defendants. In the Mississippi cases, for example, the plaintiffs "provide[d] a non-frivolous depiction of

evidence and inferences to support their claim that [non-diverse defendant] Nordan Smith did have reason to know" that "welding fumes could cause neurological injury." Second Remand Order at 10 (emphasis in original) In the Arkansas case, in contrast, "the only allegations tying [non-diverse defendants] Welsco and El Dorado to the alleged conspiracy [were] wholly generic," and the plaintiff left "unrebutted" the defendants' proffer of jurisdictional evidence contravening these generic allegations. Third Remand Order at 17, 11. The Court summed up:

> In cases where the plaintiffs have made either no or only generic allegations against specific defendants, who later adduce unrebutted evidence that they have no connection to the plaintiff nor to other appropriately-named defendants, joinder is "clearly improper." On the other hand, if the plaintiff makes specific allegations tying a specific defendant to a plaintiff or to a conspiracy among co-defendants, or if a plaintiff can adduce evidence giving color to his claims against a particular defendant, then joinder of that defendant is clearly proper.

Third Remand Order at 18-19.

Applying the same analysis to the circumstances presented here in the 31 Louisiana cases, the Court concludes the jurisdictional evidence is more akin to the latter description than the former. Unlike the situation in the Roberts case from Arkansas, where the plaintiff's only specific mention in the complaint of the non-diverse defendants was to allege their citizenship, the 31 Louisiana plaintiffs set out explicit allegations regarding Louisiana defendant Industrial Welding Supply Co. of Harvey, Inc. ("IWS"). The plaintiffs allege that IWS represents itself as "one of the largest independent welding supply distributors in Louisiana," provides "welding expert[s] to answer metallurgical questions," and is knowledgeable about the need for welding "safety equipment." Complaint ("petition") at ¶56. It is unclear the degree to which IWS, the non-diverse supplier defendant in these 31 Louisiana cases, is related to "Industrial Welding Supplies of Hattiesburg, Inc. d/b/a Nordan Smith," the in-state defendant in the Mississippi cases. But the Court's earlier analysis of whether

Nordan Smith was fraudulently joined applies equally to IWS:

> the plaintiffs provide a non-frivolous depiction of evidence and inferences to support their claim that [IWS] did have reason to know [that welding fumes could cause neurological injury] – there were documents available to industry participants showing the dangers of welding rods, and [IWS] 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 [Louisiana] law could possibly conclude one or more of the [Louisiana] distributor defendants ["knew or should have known that the product was defective, and failed to declare it." Reaux v. Deep South Equip. Co., 840 So.2d 20, 23 (La. Ct. App. 2003), writ denied, 847 So.2d 1237 (La. 2003).] In sum, the defendants have not shown that every non-diverse distributor defendant was fraudulently joined.

Second Remand Order at 10. The claims made by the 31 Louisiana plaintiffs against in-state supplier defendant IWS are as colorable as the claims made by the Mississippi plaintiffs against in-state distributor defendant Nordan Smith.

Unlike the Mississippi cases, the removing defendants in the 31 Louisiana cases have asserted an additional argument: IWS and other non-diverse suppliers cannot be liable under Louisiana law, in particular, because Louisiana law holds that, "[w]hen a product is in a sealed container or package, a vendor is entitled to reasonably rely on the assumption that the product is not defective." Barrett v. R.J. Reynolds Tobacco Co., 1999 WL 460778 at *2 (E.D. La. June 29, 1999). The supplier defendants insist that any welding rods they sold to the 31 plaintiffs originally came from the manufacturers in labeled and sealed packages, and were sent on to the plaintiffs in the same condition.

That the suppliers are entitled to rely on an assumption that the product is not defective, however, does not mean a plaintiff cannot overcome this assumption by "showing [the supplier] knew or should have known that the product was defective." Id. Certainly, a supplier, with knowledge that a product is defective, cannot avoid liability simply by pointing out that he did not modify the manufacturer's packaging before selling the

product to the consumer. As noted above, the plaintiffs have supplied allegations and evidence giving at least some color to their claim that, in fact, the suppliers should have known the welding rod products they were selling were defective. Thus, the suppliers' "sealed package" jurisdictional argument is unpersuasive.

It bears repeating that this Court has no idea whether the plaintiffs in these 31 Louisiana cases will ultimately muster enough evidence to convince a jury that, in fact, the welding rods that IWS sold were defective and IWS knew or should have known that. But "there is arguably a reasonable basis for predicting that [Louisiana] law might impose liability on the facts involved." Alexander v. Electronic Data Sys. Corp., 13 F.3d 940, 949 (6th Cir. 1994). Accordingly, defendants' fraudulent joinder argument fails.

B. Federal Officer Defense.

In the Second Remand Order, the Court examined the defendants' argument that this Court had jurisdiction over seven cases removed from Louisiana state court because there was a "colorable federal defense" to the plaintiffs' claims. Specifically, the manufacturing defendants asserted they were "acting in their role as federal military contractors when they provided the allegedly defective welding rods to the plaintiffs," so this Court had jurisdiction over the cases pursuant to the federal officer removal statute, 28 U.S.C. §1442(a)(1). Second Remand Order at 14. The primary point of contention surrounding this issue was whether the United States Navy "demand[ed] or heedfully approv[ed] reasonably precise specifications for (or warnings about) the welding rods manufactured by the defendants," or instead "the defendants . . . dictated the contents" of the specifications and warning labels to the Navy. Id. at 19, 21. The Court ultimately concluded that, "[i]n light of the arguments and evidence adduced by the defendants . . . , the military contractor defense is not so insufficiently grounded as to be devoid of color," id. at 22, and denied the motions

to remand.

Notably, one matter upon which the parties in these seven Louisiana cases agreed was that the plaintiffs were exposed to manganese in welding rod fumes while performing work for the United States Navy. Thus, there was no argument from the plaintiffs that their claims were not tied to defendants' conduct of providing welding rods compliant with federal military specifications.[2] Here, however, the 31 plaintiffs each assert their exposure to manganese in welding rod fumes did not occur in conjunction with construction or repair of Navy ships. The 31 plaintiffs thus conclude this Court does not have federal jurisdiction over their cases, because the manufacturing defendants were not acting in their role as military contractors when they produced the welding rods at issue.

After reviewing the facts pertaining to each case, the defendants conceded this argument as to 28 of the 31 plaintiffs. As to the other three plaintiffs, however, the defendants assert that "jurisdictional discovery [has] revealed that [these plaintiffs] . . . were exposed to welding fumes either as a welder or as a bystander to welding activities performed pursuant to government contract" – specifically, "vessel construction or repair for the Navy." Opposition br. at 4-5, 5-6.[3] The three plaintiffs respond that the defendants are stretching the concept of "exposure" unreasonably. As to two plaintiffs, the Court agrees.

The defendants state that plaintiff Curtis Williams "worked as a welder for Southern Shipbuilding and

---

[2] In other words, there was no argument, in the Second Remand Order, that the defendants could not meet the second prong of federal officer jurisdiction. See Feidt v. Owens Corning Fiberglas Corp., 153 F.3d 124, 127 (3rd Cir. 1998) (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).

[3] The three plaintiffs are: Fredderick Thomas, Curtis Williams, and Harry Buteaux.

while there, the company constructed the YTB OSHKOSH, a tugboat constructed for the Navy." Id. at 5 (citation omitted, emphasis added). But this statement does not find support in the record. Defendants do not claim Williams, himself, ever worked on (or even near) the OSHKOSH, and Williams states he never worked on any government project. Moreover, the evidence shows that the only tie between Williams and any government welding project is that, during the late 1960s, Williams worked in a shipyard for about six months where, years earlier, other welders had worked on the OSHKOSH. Williams remembers the vessel name OSHKOSH, but that is it. The Court agrees with Williams that the jurisdictional evidence adduced by defendants provides no color to their federal officer defense to Williams' claims.

Similarly, the defendants state that the deposition of plaintiff Fredderick Thomas revealed he "was employed by Seward Seacraft in Bayou Vista, Louisiana as a welder's apprentice from 1972-73. While there, he assisted welders who were constructing a vessel for the Navy." Id. The same deposition, however, also revealed that Thomas only welded on aluminum vessels, using welding rods that did not contain manganese. The defendants point to no evidence that Williams worked on or near any other government project where he might have been exposed to manganese-containing fumes. As with Williams, the defendants do not adduce sufficient evidence supporting any nexus between their role as military contractors and Thomas's claims.

In the case of Harry Buteaux, however, the Court reaches the opposite conclusion. The defendants explain that Buteaux, "from 1963 to 1967, served as a Boatswain Mate in the Navy. While serving in the Navy, he was stationed aboard the USS SEMMES, a guided missile destroyer. Buteaux worked in the vicinity of welding aboard the USS SEMMES while the ship was dry-docked at the Charleston Naval Shipyard undergoing repairs." Id. Buteaux responds that: (1) he was not a welder himself until after he left the Navy; and (2) the welding that occurred on the USS SEMMES was on a different deck from where he

usually worked. Buteaux concludes he never experienced exposure to welding rod fumes during his time in the Navy. But Buteaux concedes he "was on [the] ship while . . . welding was taking place," the welding occurred inside the ship at the same time he was present (although on a different deck), and he occasionally saw welding arc-lights and welding fumes. Depo. at 12-19.[4] Buteaux's acknowledgment of at least modest proximity to manganese-containing welding fumes while on a Navy ship is meaningful, moreover, because the plaintiffs have repeatedly alleged that even relatively minor exposure to such fumes can cause harm. See, e.g., Andre v. A.O. Smith, case no. 03-CV-17269, complaint at ¶¶61, 62 (alleging that "[m]anganese exposure for a period as short as 49 days can cause . . . neurological damage," and that this exposure can be suffered "indirect[ly] . . . as [a] bystander[] while working in the proximity of other persons using welding products"); Ruth v. Lincoln Electric Co., case no. 03-CV-17003, complaint at ¶¶7, 8 (same). Whether plaintiffs can ultimately prove that indirect or minimal exposure to welding fumes caused harm to any particular plaintiff is irrelevant at this stage; the threshold question is whether the Court has jurisdiction over the claims that plaintiffs assert. The jurisdictional facts in Buteaux's case support the defendants' position that a measurable portion of Buteaux's exposure to the manganese fumes that allegedly caused his injuries occurred while he was a bystander to welding activities performed pursuant to government contract. In light of these facts, Buteaux's motion to remand must be denied on the basis of federal officer removal.

[4] Having reviewed the deposition excerpts offered by the parties, the Court cannot help but note that Buteaux's counsel's repeated, forceful instructions to his client not to answer questions posed by defense counsel were contrary to Fed. R. Civ. P. 30(d)(1).

C. Federal Enclave Jurisdiction.

In addition to asserting federal jurisdiction based on fraudulent joinder and the military contractor defense, the defendants also assert that federal jurisdiction is proper as to two of the 31 Louisiana cases because these plaintiffs – Williams and Buteaux – worked in "federal enclaves." The Court has not addressed this jurisdictional basis in this MDL in its prior Remand Orders.

The fundamental basis for federal enclave jurisdiction is Article I, Section 8, Clause 17 of the United States Constitution, which " grants Congress the power to exercise exclusive jurisdiction over enclaves acquired by the United States with the state's consent for various military purposes." Celli v. Shoell, 995 F. Supp. 1337, 1341 (D. Utah 1998). "Whether federal enclave jurisdiction, a form of federal question jurisdiction, exists is a complex question, resting on such factors as whether the federal government exercises exclusive, concurrent or proprietarial jurisdiction over the property, when the property became a federal enclave and what the state law was at that time, whether that law is consistent with federal policy, and whether it has been altered by national legislation." Celli v. Shoell, 40 F.3d 324, 328 (10th Cir. 1994). It is generally safe to assume, however, that a United States military base "is a federal enclave subject to the exclusive jurisdiction of the United States." Celli, 995 F. Supp. at 1341; see Cirilo v. Lincoln Electric Co., case no. SA-04-CA-115-RF, slip op. at 5 (W.D. Tex. May 24, 2004) ("a state may not exercise jurisdiction over a federal enclave unless specifically reserved by the state at the time of her consent to the federal purchase, or unless permitted by Congress") (citing Fort Leavenworth Railroad Co. v. Lowe, 114 U.S. 525, 526-28 (1885), and

Paul v. United States, 371 U.S. 245, 268 (1963)).[5]

Defendants point out that plaintiff Williams served in the Louisiana National Guard for four years, during which time he was posted at the Fort Polk United States Army Base in Louisiana, as well as Fort Bliss United States Army Base in Texas. Defendants argue that, because Forts Polk and Bliss are federal enclaves, Williams' claims are subject to the jurisdiction of this Court. Williams responds that the factual support for this argument is anemic, because his exposure to welding rod fumes had no connection to the time he spent at Fort Polk or Fort Bliss. Williams testified that he attended a total of two weeks of National Guard training per year at the two Army Bases, plus one day per week; his duties during training were as a cook, and never as a welder; and his only exposure to welding during this time was to observe others doing some welding inside a large tent, about 150 feet away. Williams testified he became a welder only years after his National Guard service ended.

The Court agrees with Williams that there is no factual support for a nexus between his welding-fume claims and a federal enclave. Unlike the case with Buteaux, who worked inside an enclosed ship where welding occurred, it is not even arguable that Williams was close enough to suffer exposure to welding rod fumes during his time at the two Army Bases. "[W]hen the plaintiffs' claims arise out of exposure to chemicals on [a United States military] base in furtherance of their employment duties, enclave jurisdiction is properly invoked." Akin v. Big Three Industries, Inc., 851 F.Supp. 819, 822 (E.D. Tex. 1994). But that is not the case here. Because Williams' claims simply did not arise out of exposure that occurred on a federal enclave,

---

[5] The Cirilo case was later transferred to this Court as related to this Welding Rods MDL, and has been assigned case no. 04-CV-18607. Before transfer, the transferor court denied plaintiff's motion for remand, agreeing with defendants that federal enclave jurisdiction existed. Slip op. at 6. The transferor court did not examine the defendants' alternative argument that federal officer jurisdiction also existed. Id.

this Court will not exercise jurisdiction over Williams' claims.

As to plaintiff Buteaux, the Court has already concluded it has jurisdiction over his claims pursuant to the federal officer removal statute. It is notable, moreover, that a not-insignificant portion of Buteaux's exposure to welding rod fumes occurred on a federal enclave – the guided missile destroyer on which Buteaux was stationed was dry-docked at the United States Navy's Charleston Naval Shipyard. Accordingly, this Court also has federal enclave jurisdiction over Buteaux's case.[6]

II.

For the reasons stated above, the motions to remand in the 31 Louisiana cases listed in Exhibit A to this Order are all **GRANTED**, except as to plaintiff Buteaux, whose motion is **DENIED**.

IT IS SO ORDERED.

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

DATED: January 13, 2005

---

[6] "When exposures allegedly occur partially inside and partially outside the boundaries of an enclave[,] an argument [will] surface that the state's interest increases proportionally, while the federal interest decreases." Akin, 851 F.Supp. at 825 n.4. Thus, it is unavoidable that the parties will "engage in some debate about the precise ratio of the location of the plaintiff's injuries sustained on a federal enclave as compared to other sites." Cirilo, slip op. at 5. Here, Buteaux worked in propinquity to welders working on a federal military vessel or base, such that it would not be unreasonable to conclude the plaintiff inhaled material amounts of welding fumes containing manganese while on a federal enclave. Thus, there is a colorable federal nexus and federal jurisdiction over the case exists. See id., slip op. at 6 (concluding federal enclave jurisdiction was appropriate because the welder-plaintiff's claims arose "out of exposure to a chemical on a federal enclave, in not insignificant measure, and in furtherance of employment duties on the federal enclave") (emphasis added).

No.	Plaintiff	Case No.	Diversity Jurisdiction?	Federal Officer Jurisdiction?	Federal Enclave Jurisdiction?	Remand Motion Ruling
1	Andre	03-CV-17269	**No**	n/a	n/a	**GRANTED**
2	Caminita	03-CV-17271	**No**	n/a	n/a	**GRANTED**
3	Coupel	03-CV-17272	**No**	n/a	n/a	**GRANTED**
4	Davis	03-CV-17273	**No**	n/a	n/a	**GRANTED**
5	DiMarco	03-CV-17274	**No**	n/a	n/a	**GRANTED**
6	Goudeau	03-CV-17275	**No**	n/a	n/a	**GRANTED**
7	Jones	03-CV-17277	**No**	n/a	n/a	**GRANTED**
8	LaBauvre	03-CV-17278	**No**	n/a	n/a	**GRANTED**
9	Lethermon	03-CV-17279	**No**	n/a	n/a	**GRANTED**
10	Webb	03-CV-17282	**No**	n/a	n/a	**GRANTED**
11	Williams	03-CV-17283	**No**	**No**	**No**	**GRANTED**
12	Arcenaux	03-CV-17312	**No**	n/a	n/a	**GRANTED**
13	Clostio	03-CV-17313	**No**	n/a	n/a	**GRANTED**
14	Ray	03-CV-17314	**No**	n/a	n/a	**GRANTED**
15	Roberts	03-CV-17315	**No**	n/a	n/a	**GRANTED**
16	Royer	03-CV-17316	**No**	n/a	n/a	**GRANTED**
17	Starr	03-CV-17317	**No**	n/a	n/a	**GRANTED**
18	Barras	04-CV-17352	**No**	n/a	n/a	**GRANTED**
19	Champagne	04-CV-17354	**No**	n/a	n/a	**GRANTED**
20	Sanchez	04-CV-17357	**No**	n/a	n/a	**GRANTED**
21	Curole	03-CV-17303	**No**	n/a	n/a	**GRANTED**
22	Hesse	03-CV-17304	**No**	n/a	n/a	**GRANTED**
23	Szubinski	03-CV-17309	**No**	n/a	n/a	**GRANTED**

No.	Plaintiff	Case No.	Diversity Jurisdiction?	Federal Officer Jurisdiction?	Federal Enclave Jurisdiction?	Remand Motion Ruling
24	Thomas	03-CV-17310	**No**	**No**	n/a	**GRANTED**
25	Joseph	04-CV-17055	**No**	n/a	n/a	**GRANTED**
26	Leblanc	04-CV-17056	**No**	n/a	n/a	**GRANTED**
27	Lopez	04-CV-17058	**No**	n/a	n/a	**GRANTED**
28	Marcel	04-CV-17060	**No**	n/a	n/a	**GRANTED**
29	Vilardo	04-CV-17062	**No**	n/a	n/a	**GRANTED**
30	Buteaux	03-CV-17300	**No**	**Yes**	**Yes**	**Denied**
31	Williams	03-CV-17323	**No**	n/a	n/a	**GRANTED**