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1990

September 28, 1990

Admiral Elmo R. Zumwalt, Jr., USN Ret.
1500 Wilson Boulevard
Arington, Virginia 22209

Re: Shirley Ivy, et al. v. Diamond Shamrock, et al.

Dear Admiral Zumwalt:

This Firm is pro bono counsel to Plaintiffs Shirley Ivy, et al. in the above-captioned class action Agent Orange litigation filed in Texas state court. This lawsuit seeks recovery for injuries manifested, and discovered to have been caused by Agent Orange, after the 1984 settlement of the multidistrict Agent Orange litigation before Judge Weinstein in New York federal district court.

In light of your interest in Agent Orange issues, we are enclosing for your review advance copies of briefs to be filed shortly in the current lawsuit which, at the Defendant Chemical Companies' request, was wrongfully removed from state to federal court and then transferred to Judge Weinstein in New York. The enclosed briefs seek reversal of both the removal to federal court and the transfer to New York. The preliminary round in this litigation was reported in the May-June issue of the Military Law Reporter, 18 MLR 2269, a copy of which is also enclosed for your information.

It is critical for Plaintiffs to secure return of their case to the Texas courts in order to obtain a fair and impartial hearing. You may recall that Judge Weinstein dismissed, for lack of sufficient expert evidence, all Agent Orange cases not included in the 1984 class settlement. The Defendant Chemical Companies clearly intend to obtain a similar dismissal from Judge Weinstein in this case. There was, however, no legal basis for either removing this case from Texas state court or transferring it to New York. The enclosed briefs address these issues.

To encourage that this case be decided according to law, we believe it should be brought to public light. As you know, the issues involved in proving Agent Orange injuries have developed a great deal since the prior Agent Orange lawsuit. Because you have been so forthright and courageous in publicly addressing these issues, your recognition of this case would mean a great deal to the Plaintiffs and their families.

We welcome the opportunity to discuss this matter with you, at your convenience. Please feel free to call me at 202-857-4553, or my co-counsel, Rob Hager, at 202-331-9831.

Very truly yours,

Melissa Chappell-White

MELISSA CHAPPELL-WHITE
For The Firm

MCW/pr
Enclosures

cc: Rob Hager, Esq.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SHIRLEY IVY, et al. Plaintiffs v. DIAMOND SHAMROCK, et al. Defendants	MDL Docket No. 381 JBW

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR REMAND

I. INTRODUCTION

Plaintiffs Shirley Ivy, et al., by counsel, respectfully submit this Memorandum in support of their Motion for Remand, showing that there is no basis for federal subject matter jurisdiction in this case.

Plaintiffs originally brought this action in Texas state court. Defendants then filed a notice of removal to federal court, despite the apparent lack of any credible basis for federal jurisdiction. Defendants also sought a transfer to this Court pursuant to the Multidistrict Litigation Statute. Plaintiffs opposed both the removal and the transfer of this action.

After the Multidistrict Litigation (MDL) Panel ordered this case transferred notwithstanding the apparent lack of federal jurisdiction, Plaintiffs petitioned the Second Circuit

Court of Appeals for review of the transfer order as provided by the MDL statute, 28 U.S.C. § 1407(e). The Court of Appeals addressed neither the subject matter jurisdiction of the MDL Panel to make a § 1407 transfer nor the merits of the § 1407 transfer issue itself. The Court ruled instead that the question of federal jurisdiction should first be presented to this Court and that the MDL Panel has inherent power to transfer for this narrow purpose. Therefore, after three federal courts have declined to address the lack of any apparent basis for federal subject matter jurisdiction over this case in deference to this Court, Plaintiffs now respectfully request that this Court grant their Motion for Remand and return this action to the state District Court for Orange County, Texas, from which it was removed contrary to law and the Constitution of the United States.

II. STATEMENT OF FACTS

Plaintiffs in this action are Vietnam veterans and others who sued in Texas state court on behalf of themselves and all persons similarly situated. They seek damages for injuries caused by exposure to contaminated defoliants, including Agent Orange, which injuries were manifested and discovered only after May, 1984.

For example, lead Plaintiff Shirley Ivy, a resident of Texas, sues on behalf of herself and her deceased husband,

Donald Ivy, whose death resulted from cancer which was discovered in 1987 and subsequently diagnosed as having been caused by exposure to Agent Orange. Donald Ivy had no prior knowledge that he had incurred injuries caused by Agent Orange while he was serving as a Marine captain in Vietnam.

Defendants are manufacturers of chemical herbicides, such as Agent Orange, and include among them a Texas corporation.

Plaintiffs' causes of action, as set forth in "Plaintiffs' Original Petition" filed in the state District Court for Orange County, Texas, arise solely under state law, sounding in state negligence, product liability, and punitive damages law. (A copy of the Complaint is attached hereto as Ex. A.) These causes of action could not arise before Plaintiffs' injuries were discovered and diagnosed, which occurred only after the May, 1984 settlement of the MDL Docket No. 381 multidistrict Agent Orange class action in this Court.[1/]

1/ That class action settlement terminated by dismissal with prejudice claims, for injuries to Vietnam veterans caused by Agent Orange, which arose prior to the settlement. Pursuant to agreement of the parties, this Court has retained authority to supervise distribution of the settlement fund. See In re Agent Orange Product Liability Litigation (MDL 381), 597 F.Supp. 740, 866 ¶ 19 (E.D.N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. den., 484 U.S. 1004 (1988). Other claims, of persons who prior to May, 1984 had opted out of the settled class action, were subsequently dismissed on

[Footnote Continued On Next Page]

III. STATEMENT OF THE CASE

This litigation was filed in the Orange County, Texas state court. Plaintiffs include residents of Texas, where at least one Defendant chemical company maintains its home office (Complaint, Ex. A, at pp. 3-4).[2/]

This suit was expressly brought "solely under Texas state law and not under any Federal law" (id. at p. 8, emphasis in original). If Texas law does not support Plaintiffs' causes of action without the aid of federal law, then they have no causes of action and this case will be dismissed from Texas state court. Plaintiffs allege damages caused by chemicals, including Agent Orange, "defectively designed, formulated, tested, manufactured and marketed by the Defendant Chemical Companies" (id. at pp. 9-11). The Complaint seeks

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1/ [Footnote Continued From Previous Page]

grounds of insufficient evidence. In re Agent Orange (MDL 381), 611 F.Supp. 187 (E.D.N.Y. 1985), aff'd, 818 F.2d 187 (2d Cir. 1987), cert. den., 487 U.S. 1234 (1988). A few cases filed after 1984, apparently for injuries arising before 1984, have also been dismissed. One other case, Hartman, was voluntarily dismissed after having been improperly removed and transferred in the same manner as this case. The Ivy class action involves claims which arose only after the 1984 settlement of, and after the deadline for opting out of the class certified in, the MDL 381 multidistrict Agent Orange litigation.

2/ Defendants do not assert that there is diversity of citizenship in this case that could provide a basis for jurisdiction under 28 U.S.C. § 1332. Even if there were diversity, this case could not be removed. See 28 U.S.C. § 1441(b).

certification of a class, pursuant to Texas Rule of Civil Procedure 42, excluding claims for any injuries to veterans caused by Defendants' chemicals that were discovered, and which may have therefore arisen, prior to the date of the settlement of the MDL 381 cases in May, 1984 (id. at p. 16).[3/]

Defendants removed this action to the United States District Court for the Eastern District of Texas, alleging that:

> Th[e] Court has original jurisdiction over this action because most of Plaintiffs' claims have already been asserted and adjudicated in federal court and Plaintiffs' petition is merely an artful pleading to avoid federal jurisdiction.
>
> Th[e] Court also has original jurisdiction over this action pursuant to 28 U.S.C. § 1331 based on the doctrine of complete federal preemption.

(Notice of Removal, attached hereto as Ex. B, p. 6, at ¶¶ VI, VII.) Defendants apparently will present res judicata and Government contractor defenses as bases for federal question jurisdiction. (See infra, at pp. 14-16, 19.) Defendants knew there was no federal question jurisdiction over Agent Orange claims, however, because they had previously litigated that

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3/ Under Texas law, a cause of action for personal injury accrues upon plaintiffs' discovery of the injury and its cause, and the question when a plantiff knew of the injury and its cause is an issue of fact for trial. See, e.g., Grady v. Faykus, 530 S.W.2d 151 (Tex.App. 1975) (cancer caused by excessive radiation treatment).

same issue in In re Agent Orange Product Liability Litigation (MDL 381), 635 F.2d 987 (2d Cir. 1980).[4/]

In re Agent Orange (MDL 381) involved claims by Vietnam war veterans and their families for injuries allegedly sustained by reason of the veterans' exposure to various chemical herbicides. 635 F.2d at 988. The In re Agent Orange (MDL 381) plaintiffs sought redress for their injuries from exposure to Defendants' chemicals in Vietnam under federal common law, and invoked federal question jurisdiction. Id. These same Defendant chemical companies raised a Government contractor defense in that case, contested the existence of a federal common law cause of action for such injuries, and moved to dismiss for lack of federal subject matter jurisdiction. Id. The Court of Appeals agreed, finding that the claims in MDL 381, as here, were:

> not asserted by or against the United States, and they do not directly implicate the rights and duties of the United States. . . . Since this litigation is between private parties and no substantial rights or duties of the government hinge on its outcome, there is no federal interest. . . .

4/ Defendants in that case included the same chemical companies involved here: Diamond Shamrock Corporation, Monsanto Company, Thompson Hayward Chemical Company, Hercules Incorporated, and the Dow Chemical Company. 635 F.2d at 988. The Agent Orange (MDL 381) defendants were represented by, among others, Leonard Rivkin. 635 F.2d at 987. The Defendant chemical companies in this action are also represented by Mr. Rivkin (Notice of Removal, Ex. B, at p. 7).

638 F.2d at 993. The Court of Appeals noted that its "ruling on subject matter jurisdiction [will] end the federal court litigation [unless] plaintiffs seek to proceed on the basis of diversity jurisdiction." Id. at n.10.[5/]

Plaintiffs moved to remand from the Texas federal district court to the Texas state court, for lack of any apparent federal subject matter jurisdiction (Plaintiffs' Motion to Remand, attached hereto as Ex. C and incorporated herein by reference). The Texas district court deferred ruling on Plaintiffs' Motion to Remand pending resolution of the transfer proceeding. (Transcript of hearing before the MDL Panel, September 28, 1989, attached hereto as Ex. D, at pp. 94-95.)

At the same time that Defendants removed the present action to federal court, they also requested a transfer to this Court under the Multidistrict Litigation Statute, 28 U.S.C. § 1407 (Ex. B, at pp. 3-4). Plaintiffs opposed transfer, arguing before the MDL Panel the following two grounds: first, that the prerequisites for transfer under 28 U.S.C. § 1407 were lacking; and second, that as a federal court the MDL Panel lacks authority to transfer a case where no arguable basis for federal subject matter jurisdiction exists. Oral argument was

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5/ The Agent Orange (MDL 381) plaintiffs, unlike the Plaintiffs in this case, did choose to proceed on the basis of diversity jurisdiction. 580 F.Supp. 690, 691 (E.D.N.Y. 1984).

heard before the Multidistrict Litigation Panel. A transfer order was issued October 4, 1989, holding that the jurisdictional issue raised in Plaintiffs' Motion to Remand "can be presented to and decided by" this transferee Court. The MDL Panel made no findings on the three threshold statutory prerequisites for a § 1407 MDL transfer.

Plaintiffs then petitioned the U.S. Court of Appeals for the Second Circuit requesting a "writ of mandamus directing the MDL Panel to vacate the transfer order on the ground that there is no federal subject matter jurisdiction." In re Ivy, et al., 901 F.2d 7, 9 (2d Cir. 1990). The Court of Appeals denied the petition, holding that "the MDL Panel has jurisdiction to transfer a case in which a jurisdictional objection is pending. . . that objection to be resolved by the transferee court." 901 F.2d at 9.

The Court cited in support of this ruling the analogous principle, established in United States v. United Mine Workers of America, 330 U.S. 258, 290 (1970), that a district court has authority to issue an injunction pending resolution of jurisdictional questions. The cited page of the United Mine Workers opinion states that:

> [T]he District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction.

330 U.S. at 290 (emphasis added). By analogy, the MDL Panel, independent of the transfer statute, would have inherent authority to transfer a case for the purpose of decision, by the transferee court, on the subject matter jurisdiction of the federal courts. The Court of Appeals ruled that "Section 1407 does not empower the MDL Panel" to determine federal jurisdiction and, therefore, it may transfer a case to a convenient court to make such a determination. 901 F.2d at 9.

In creating a new inherent judicial power for transfer to determine jurisdiction, analogous to that created in United Mine Workers, the Court of Appeals did not reach the issue whether transfer of a lone case from one federal district to another for plenary pretrial proceedings is permitted by § 1407. Instead, the Court of Appeals conferred narrow inherent power on this Court to address the sole question of jurisdiction, independent of the carefully circumscribed § 1407 powers to transfer for purposes of plenary pretrial proceedings.

Moreover, the Court of Appeals found that this case did not present exceptional circumstances justifying issuance of a writ of mandamus, because Plaintiffs had not sought mandamus after denial of both remand and voluntary dismissal in this Court, nor had the jurisdictional issue been certified by this Court for interlocutory appeal. 901 F.2d at 10. Thus, although the Court of Appeals recognized that transfers under

the Multidistrict Litigation Act can only be reviewed by petition for extraordinary writ, id. at 9, it declined to address the question of jurisdiction or, implicitly, that of § 1407 transfer, until after Plaintiffs had obtained a ruling from this Court on the question of federal subject matter jurisdiction.

Plaintiffs had intended to present the lack of any arguable basis for federal jurisdiction as only one of two alternative grounds upon which the MDL Panel's transfer order should be vacated, the other being that the statutory prerequisites for multidistrict transfer were lacking. The petition, however, was apparently not so considered by the Court of Appeals, inasmuch as the Court's ruling in I[illegible] did not address whether it is proper to transfer this case for any purpose other than a determination of jurisdiction.

The Multidistrict Litigation Act expressly precludes review of MDL Panel transfer orders other than by petition for extraordinary writ to the court of appeals having jurisdiction over the transferee court. 28 U.S.C. § 1407(e). Plaintiffs therefore do not present in this Motion any issues other than lack of federal subject matter jurisdiction. If this Court remands this case to Texas state court on that ground, the lack of statutory prerequisites for § 1407 MDL transfer will be moot. However, in the event that this Court should find grounds for assuming federal subject matter jurisdiction over

this case, Plaintiffs have also filed a petition for extraordinary writ in the Court of Appeals, to preserve the very substantial transfer issues for review, if necessary. (See Petition for Extraordinary Writ to Review Transfer for Pretrial Proceedings Other Than for the Determination of Federal Jurisdiction, attached hereto as Ex. E.)

IV. THE LACK OF FEDERAL QUESTION JURISDICTION OVER PLAINTIFFS' CLAIMS HAS ALREADY BEEN ESTABLISHED.

Defendants have alleged federal question jurisdiction as the basis for their removal of this action from state to federal court (Notice of Removal, Ex. B, at p. 1.) But when they filed their Notice of Removal, Defendants knew that no federal question was presented by Plaintiffs' Complaint. Defendants had previously contested the existence of such jurisdiction in a case indistinguishable on this issue, and obtained a Court of Appeals ruling that no federal jurisdiction exists.

The plaintiffs in In re Agent Orange, 635 F.2d 987, 995 (2d Cir. 1980), asserted federal question jurisdiction. This Court upheld jurisdiction; these same Defendants then appealed that decision, arguing that there was no basis for federal jurisdiction, and prevailed. The Court of Appeals held that, absent diversity, there is no basis for federal subject matter jurisdiction over Agent Orange claims. 635 F.2d at 995.

That holding, which cannot be distinguished from this case, is binding precedent. See, Ithaca College v. N.L.R.B., 623 F.2d 224, 229 (2d Cir. 1980) (district courts bound to follow law of the Circuit); United States v. Olivares-Vega, 495 F.2d 827, 829 (2d Cir. 1974) (law in this Circuit controls); Woodling v. Texasgulf Aviation, Inc., 636 F.Supp. 327, 328 n.2 (S.D.N.Y. 1986) (same).[6/]

"Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986). The only relevant jurisdictional enactments of Congress are 28 U.S.C. §§ 1331 and 1332. Defendants do not allege § 1332 diversity jurisdiction and are precluded by binding precedent from asserting § 1331 federal question jurisdiction. There is no other source of law authorized by the Constitution or enacted by Congress which might confer jurisdiction over this case upon a federal court.

Unlike substantive federal statutes, the Multidistrict Litigation Act is procedural and does not confer any jurisdiction on the federal district courts. See, e.g.,

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6/ Defendants would also be estopped from asserting federal question jurisdiction over this type of suit. See American Nat'l Bank v. Federal Dep. Ins. Corp., 710 F.2d 1528, 1536 (11th Cir. 1983) (judicial estoppel "doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings").

Village Improvement Ass'n of Doylestown v. Dow Chemical, 655 F.Supp. 311, 314 (E.D. Pa. 1987) (multidistrict litigation statute provides no independent grant of jurisdiction to the federal courts for consolidation of state and federal judicial proceedings); In re Celotex Corp. "Technifoam" Products Liability Litigation, 68 F.R.D. 502, 503 n.2 (J.P.M.L. 1975) (multidistrict litigation panel does not have power under § 1407 to consider propriety of coordinated or consolidated pretrial proceedings in state court actions). Therefore, notwithstanding a transfer under the multidistrict litigation statute, a case must be remanded to state court if improperly removed. In re Sugar Antitrust Litigation, M.D.L. 201, 588 F.2d 1270, 1271, 1274 (9th Cir. 1978) (action removed from state court and joined with multidistrict litigation remanded because complaint did not arise under federal law and district court therefore had no jurisdiction); Bancohio Corp. v. Fox, 516 F.2d 29, 32 (6th Cir. 1975) (multidistrict statute provides no exception to rules governing removal).

Absent diversity between plaintiffs and defendants, removal of an action is improper unless the action was founded on a claim arising under federal law. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 28 (1983). Whether claims arise under federal law is determined by reference to the "well pleaded complaint" rule, which sharply defines the cases that may be removed from state court to

federal court. Id. at 9-10. As shown below, under that rule, it is clear that no claim in Plaintiffs' Complaint arises under federal law.

The question of federal subject matter jurisdiction has already been decided in this Circuit. Yet Defendants seek to avoid the Court's indistinguishable holding on lack of such jurisdiction in the Agent Orange MDL 381 litigation. Defendants' position directly contradicts the controlling law of this Circuit without advancing a good faith argument for changing that law. Apparently mindful of their exposure to Rule 11 sanctions in this matter, Defendants have thus far refused to actually make any argument that some supposed basis for federal jurisdiction is warranted by existing law, but instead merely repeat that the issue should be decided by this Court. In fact, as Defendants well know and Plaintiffs have asserted in repeated filings, there is no jurisdictional "issue" to be determined in this case.

After three federal courts have declined to do so, this Court will be the first to judge the quality of Defendants' ingenuousness in formulating some new premise for federal question jurisdiction.

Defendants' Notice of Removal cites two cases which allegedly support "original jurisdiction over this action pursuant to 28 U.S.C. § 1331 based on the doctrine of complete federal preemption" (Notice of Removal, Ex. B, at p. 6,

¶ VII). Even a cursory reading of those two cases, however, reveals that neither provides any measure of support to Defendants' unprecedented notions of federal jurisdiction in this action.

One case cited by Defendants, Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987), expressly reaffirms the lack of federal jurisdiction based solely on a defense grounded in federal law. The other case, Boyle v. United Technologies Corp., 487 U.S. 500 (1988), has nothing to do with jurisdiction. It merely confirms the availability of a limited federal contractor defense in a diversity action, and says nothing whatsoever about the "complete federal preemption" corollary to the well-pleaded complaint rule, upon which Defendants purport to rely.

A recent decision in this Circuit, In re Joint Eastern and Southern District New York Asbestos Litigation, 897 F.2d 626, 634-35 (2d Cir. 1990), makes clear that the Government contractor defense upon which Defendants rely has been more narrowly tailored by the Supreme Court in Boyle than when it was applied to the MDL 381 Agent Orange cases. It will not, therefore, apply to this case in any event. But the Court of Appeals has already held in the MDL 381 proceeding, that even the broadest statement of this defense would still furnish no basis for federal jurisdiction.

Defendants have virtually conceded the lack of federal jurisdiction in prior proceedings in this matter, by failing to even argue any good faith basis for their notions of jurisdiction in their Opposition to Plaintiffs' Motion to Vacate the Conditional Transfer Order, or in the MDL hearing thereon. The only jurisdictional "issue" presented by Defendants that was not clearly raised and rejected in the MDL 381 proceeding is Plaintiff's alleged membership in the class certified in that case. (<u>See infra</u>, at p. 31.) But membership of a class in a federal case that has been dismissed cannot under any known law or precedent provide a basis for federal jurisdiction over another case which lacks either a federal question or diversity between the parties. At best, class membership in the earlier case could raise only the defense of <u>res judicata</u>, which is no basis for federal jurisdiction. Rather than forthrightly arguing their <u>res judicata</u> defense based on Plaintiffs' alleged membership in the settled and dismissed class action suit, Defendants have been content to urge that the transferee court should decide jurisdiction, even though they knew that under binding precedent there was no genuine jurisdictional "issue" to be determined in this case.

V. THIS CASE SHOULD BE REMANDED TO STATE COURT BECAUSE THE FEDERAL COURTS LACK ANY SEMBLANCE OF JURISDICTION OVER THE MERITS OF THIS ACTION

Because it clearly appears that there can be no federal jurisdiction over this suit, the case must be dismissed from federal court and remanded to Texas state court. The relevant statute leaves no room for discretion:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorneys fees, incurred as a result of the removal.

28 U.S.C. § 1447(c) (emphasis added). See also, F.R.Civ.P. Rule 12(h)(3).

Under the federal removal statute, 28 U.S.C. § 1441, an action may be removed from state court only where the federal court would have original jurisdiction over the case. The only basis which Defendants assert for removal of this action is federal question jurisdiction under 28 U.S.C. § 1331 (Notice of Removal, Ex. B, at pp. 1, 6). Federal question jurisdiction extends only to those "civil actions arising under" federal law. 28 U.S.C. § 1331. As shown below, there is no justifiable basis for arguing that this case arises under federal law.

A. This Action Arises Exclusively Under State Law.

Plaintiffs have pleaded exclusively Texas causes of action in their Complaint. Insofar as non-Texas Plaintiffs may join the class, the law of other states may potentially apply under Texas conflict of laws principles. However, Plaintiffs do not need to, do not in any way seek to, and clearly do not on the face of their Complaint, avail themselves of any federal law whatsoever in making out their causes of action in this case (see Plaintiffs' Original Petition, Ex. A). Nor are any federal causes of action lurking beneath the surface of Plaintiffs' Complaint. Plaintiffs have expressly eschewed any federal basis for their claims.

Defendants allege that Plaintiffs' Complaint "is merely an artful pleading to avoid federal jurisdiction" (Notice of Removal, Ex. B, at p. 6, ¶ VI). The artful pleading doctrine applies where a plaintiff purporting to plead a claim based on state law is necessarily relying on federal law for relief, due to the transformation of the state claim into a federal claim under the "complete preemption" corollary of the well-pleaded complaint rule. See Caterpillar Inc. v. Williams, supra, 482 U.S. at 393. Defendants can prevail on this argument only if they can show that "plaintiff would be required to plead and prove a proposition of federal law to win a default judgment." League to Save Lake Tahoe v. B.J.K. Corp., 547 F.2d 1072, 1074 (9th Cir. 1976). Defendants' attempt to make such a showing at

the hearing before the MDL Panel degenerated into confusion and self-contradiction. (See infra at p. 31.) Plaintiffs' Complaint would easily support a default judgment against Defendants without reliance upon any federal law whatsoever.

As shown above, it has already been determined that Agent Orange claims of this kind do not rely upon and cannot "arise under" federal law. Defendants point neither to any element of Plaintiffs' causes of action, whether present in the Complaint or "artfully" omitted from the Complaint, that would raise a federal question, nor to anything at all that might be federal in character other than Defendants' own anticipated defenses. Because the well-pleaded complaint rule and its "artful pleading" corollary expressly exclude federal defenses as a basis for federal jurisdiction, the doctrine of artful pleading cannot support removal of this action from state court.

B. Federal Defenses To State Law Claims Provide No Basis For Federal Question Jurisdiction.

Defendants suggest that federal question jurisdiction may be premised upon two defenses they may raise in this case and which they would argue are federal in character: (1) the "government contractor defense," and (2) the res judicata effect of a federal diversity class action settlement (Notice of Removal, Ex. B, at p. 6, ¶¶ VI, VII). But even assuming, momentarily, for purposes of argument, that these defenses are "federal" in character, Defendants' assertion of one or more

federal defenses to claims sounding exclusively in state law is entirely irrelevant to Defendants' objective of constructing some basis for federal question jurisdiction.

1. A Federal Question Can Only Arise From The Statement Of Plaintiffs' Claims In The Complaint.

One of the most clearly defined and consistently enforced doctrines of law reaffirmed by the Supreme Court in recent years is the long settled rule that federal question jurisdiction is limited to those cases where a federal question is presented in plaintiff's complaint as an element of the cause of action. (See cases cited infra at pp. 22-23.) A federal defense to a claim created by state law provides no basis for 28 U.S.C. § 1331 federal question jurisdiction if the cause of action itself depends on no element of, and therefore does not arise under, federal law.

In Justice Holmes' concise statement of the rule, "[a] suit arises under the law that creates the cause of action." American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 259 (1916). "Congress has long since decided that federal defenses do not provide a basis for removal." Caterpillar, Inc. v. Williams, supra, 482 U.S. at 399. By this rule, Congress and the Court have restricted removal and the federal question jurisdiction of the federal courts to only those cases which present a cause of action created by federal law. The Supreme Court rigidly enforces this limitation on the

jurisdiction of the federal courts. Otherwise, creative pleading by defendants could easily strip the state courts of their jurisdiction to adjudicate actions arising exclusively under state law, and the federal courts could be deluged with the business of state courts. See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 66 (1950).

In this case, Defendants' theory of federal jurisdiction would go further than anything even argued before. Defendants allege that there is a § 1331 federal question involved in this case, which appears nowhere in any of the pleadings, simply because Defendants assert they may wish to eventually argue defenses possessing some possible federal character which, parenthetically, do not appear to apply, in any event, to the facts of this case. Needless to say, no case has come close to endorsing such a theory, and Defendants cite none. The two cases that are cited by Defendants, (see Notice of Removal, Ex. B, at p. 6), do not state any exception to the rule that to confer federal jurisdiction, the complaint itself must show that a federal question is presented as a necessary and substantial element of Plaintiffs' cause of action. No tortuous reading of these cases can create a federal element to Plaintiffs' cause of action where none now exists.

2. A Federal Preemption Defense Provides No Basis For Federal Question Jurisdiction.

The U. S. Supreme Court in Caterpillar Inc. v. Williams, supra, cited by Defendants, expressly confirmed that:

> it is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly in issue.

482 U.S. at 393 (emphasis in original). See also Louisville & Nashville Railroad v. Mottley, 211 U.S. 149 (1908) (preemption claim: "[i]t is settled . . . that a suit arises under [federal laws] only when the plaintiff's statement of his own cause of action shows that it is based upon those laws"); Pan American Petroleum Corporation v. Superior Court, 366 U.S. 656 (1961) (same). Summarizing the "paramount policies" of the "well-pleaded complaint" rule, the U.S. Supreme Court has stated,

> that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.

Caterpillar Inc. v. Williams, 482 U.S. at 398-99 (emphasis added).

These principles, which the Court describes as "powerful doctrine," Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983), express the two complementary features of the rule for determining federal question jurisdiction: (1) that the federal question must appear from the face of the complaint; and (2) that the federal question must constitute a substantial element of Plaintiffs' claim for relief, and not relate solely to an anticipated defense to that claim.

This rule has been given unwavering support by the Supreme Court. Only recently the Supreme Court again confirmed that the federal question issue "must be determined from what necessarily appears in the plaintiff's statement of his own claim . . . , unaided by anything alleged in anticipation of avoidance of defenses." Oklahoma Tax Commission v. Graham, 489 U.S. 838 (1989) (per curiam) (defense of federal immunity from state taxation of Indian tribe, and special federal relationship with Indians, provide no federal question jurisdiction for removal of state tax claim from state court) (citations omitted).7/

7/ See also State of New York v. White, 528 F.2d 336, 338 (2d Cir. 1975) (federal question jurisdiction may not be based on allegations addressing an anticipated defense); Debevoise v. Rutland Railway Corp., 291 F.2d 379, 380 (2d Cir.), cert. den., 368 U.S. 876 (1961) (even certainty

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3. The "Government Contractor Defense" Is No Exception To The Rule That A Federal Question Must Be An Element of Plaintiffs' Claim.

Boyle v. United Technologies Corp., 487 U.S. 500, (1988) (5-4 decision) created a "federal common law" immunity defense, under certain conditions, for contractors who supply defective products to the Federal Government. To prevail on this defense, Defendants must first prove that the state law which is the basis for Plaintiffs' claims is in "significant conflict" with "reasonably precise" government specifications

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7/ [Footnote Continued From Previous Page]

that federal law will enter case by way of defense does not confer jurisdiction or support removal). Even prior to the Supreme Court's recent rulings the Courts of Appeals were unanimous in holding that neither a defense claiming federal preemption of state action, nor any other federal defense, could raise a federal question. See Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1180 n.7 (5th Cir. 1985) ("federal question jurisdiction is not shown by . . . action in which the federal claims would arise only by way of defense"); First Federal Savings & Loan of Lake Worth v. Brown, 707 F.2d 1217, 1220-21 (11th Cir. 1983); Armstrong v. Armstrong, 696 F.2d 1237 (9th Cir. 1983); First Federal Savings & Loan v. Detroit Bond & Mortgage, 687 F.2d 143 (6th Cir. 1982) (dismissing for lack of jurisdiction where federal preemption claim is defense to threatened enforcement of state law); First Federal Savings & Loan v. Anderson, 681 F.2d 528, 533 (8th Cir. 1982); Illinois v. Kerr-McGee Chemical Corp., 677 F.2d 571, 577 (7th Cir.), cert. den., 459 U.S. 1049 (1982) (Atomic Energy Act preemption defense -- an example of virtually complete federal preemption -- does not raise a federal question); Trent Realty Assoc. v. First Federal Savings & Loan Assoc., 657 F.2d 29, 35 (3d Cir. 1981) ("no basis for removal jurisdiction in the anticipated defense of federal preemption"); Chandler v. O'Bryan, 445 F.2d 1045, 1055-56 (10th Cir. 1971), cert. den., 405 U.S. 964 (1972).

requiring the product's defects. Id., 487 U.S. at 512. See also, Asbestos Litigation, supra, 897 F.2d at 635. Though Defendants did not plead this defense in their Answer, whether Defendants may properly invoke this defense will undoubtedly be a disputed issue of fact in this litigation. To sustain such a defense, Dow and the other chemical manufacturers would need to prove further (1) that the advisability of including the dangerous dioxin contaminants in Agent Orange "was considered by a Government officer, and not merely by the contractor itself"; and (2) that each "supplier warned the United States about the dangers . . . that were known to the supplier but not to the United States", of exposing U.S. troops to a defoliant in Vietnam that was contaminated with dangerous dioxins. Boyle, supra, 487 U.S. at 512.

This defense, characterized by Defendants as a "doctrine of complete federal preemption" (Ex. B, at p. 6) -- a description which is nowhere found in Boyle itself -- provides no exception to the rule governing federal question jurisdiction.[8/] Boyle expressly held that "whether the facts

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8/ Defendants attempt to confuse their potential preemption defense with the "complete preemption" corollary of the well-pleaded complaint rule, by calling it "complete". But Boyle did not even involve broad ranging preemption in the sense of replacing an entire body of law, let alone remotely concern the technical legal sense of the term "complete federal preemption", i.e., converting a

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establish the conditions for the defense is a question for the jury." 487 U.S. at 514. Accordingly, it will be impossible to determine whether Defendants' Government contractor defense would preempt Plaintiffs' claims in this case until a jury hears that defense. This precludes any conceivable possibility for "complete preemption" at the stage of determining the threshhold question of jurisdiction, because a jury may well decide there is no preemption at all of state law by this defense, let alone substitution of a federal cause of action for a state cause of action.

The Courts refuse to premise federal question jurisdiction on such a defense even where the issue of preemption is purely a question of law, is dispositive, and is raised in the complaint itself. (See supra at p. 22.) No decision of any court remotely suggests that a defense, the existence of which depends on facts that can only be decided by a jury at the end of trial, could impart federal question

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state cause of action into a federal cause of action in accordance with a corollary of the well-pleaded complaint rule. In Boyle, the Supreme Court expressly noted that although government procurement is an area of "unique federal concern", that "merely establishes a necessary, not a sufficient, condition for the displacement of state law." 487 U.S. at 507. Far from "complete" preemption, the Court found that state law which holds Government contractors liable for design defects in military equipment is only displaced "in some circumstances". 487 U.S. at 512.

jurisdiction to conduct the trial. Such a principle would require an extreme departure from the black-letter "well-pleaded complaint" rule that requires the federal question to appear on the face of the complaint, as an element of Plaintiffs' cause of action.

By using the term "complete federal pre-emption" without explanation Defendants allude to a "corollary to the well-pleaded complaint rule [which] is applied primarily in cases raising claims pre-empted by § 301 of the LMRA", that permits removal to federal court of any claims founded in the provisions of a collective bargaining agreement. These claims thereby become "purely a creature of federal law" whether or not the federal law is mentioned in the Complaint. Caterpillar Inc. v. Williams, 482 U.S. at 393-394. This narrow corollary to the rule that removable federal claims must appear on the face of the complaint has been applied only where "Congress has clearly manifested an intent to make causes of action . . . removable to federal court." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987) (ERISA claim). This corollary provides no remotely arguable basis for federal jurisdiction in the instant case for at least three reasons.

First, Congress has not made this kind of claim removable. Since Congress rejected proposed legislation similar to the Boyle Government contractor defense, 487 U.S. at 505 and n.1, and Boyle is entirely judge-made federal common

law, Congress has clearly not manifested an intent to completely preempt state rules of liability whenever a government contractor causes injury by a defective product, much less to preclude state court jurisdiction over any such state claims by making them all removable to federal court.

Second, this narrow "complete pre-emption" rule applies only to certain extraordinary types of claims which Congress has transmuted into exclusively federal causes of action. It has nothing to do with the defense of federal preemption. Plaintiffs' state causes of action simply do not conceal any extraordinary federal law substratum, such as LMRA or ERISA, which would "convert[] an ordinary state common law complaint into one stating a federal claim. . . ." Caterpillar Inc. v. Williams, supra, 482 U.S. at 393 (quoting Metropolitan Life Insurance Co., supra, 481 U.S. at 65). These are ordinary state tort claims that bear no relation to any such body of federal law, and in which Congress has expressed no interest whatsoever.

Third, as shown, the occasion for applying the "complete pre-emption" concept is where there can be no doubt that an apparent state cause of action has in fact been completely replaced by a federal cause of action. Boyle was a diversity action which nowhere mentions, or suggests, that it was substituting a new federal products liability cause of action or ousting state jurisdiction to try state products liability

claims against federal government contractors. Boyle does not substitute a federal cause of action for, but rather limits the availability of, a state cause of action against government contractors under certain narrow circumstances. Thus, even if the Court, rather than Congress, could create "complete pre-emption" by transmuting a state claim into a federal claim, Boyle did not in fact do so. In short, Boyle creates a defense, not a new federal cause of action, and the law could hardly be more clear that a defense -- of whatever description -- simply cannot provide a basis for federal question jurisdiction.

4. Defendants' Res Judicata Defense Is No Exception To The Rule That A Federal Question Must Be An Element Of Plaintiffs' Claim

Dow also plans to present a defense of res judicata, or collateral estoppel, that Plaintiffs' claims were settled or dismissed in the MDL 381 action, albeit without notice to or any participation by Plaintiffs, before their claims even arose, and even though Plaintiffs have, at their first opportunity, expressly "opted out" of any pertinent class action pending outside of Texas which might include these claims.

Any argument that Plaintiffs' claims might be barred by res judicata or collateral estoppel is a defense and, therefore, not a basis for removal of a state action to federal court. See, e.g., Davis v. U.S. Steel Supply, 688 F.2d 166,

170 (3d Cir. 1982), cert. den., 460 U.S. 1014 (1983) (res judicata is an affirmative defense). Raising a federal judgment to bar state claims in state court does not alter this fact. "A state court is as well qualified as a federal court to protect a litigant by the doctrines of res judicata and collateral estoppel." Bluefield Community Hospital, Inc. v. Anziulewicz, 737 F.2d 405, 408 (4th Cir. 1984). A res judicata defense to state claims filed in state court based on a federal judgment must therefore be pursued in state court like any other defense. No case provides the remotest support for federal question jurisdiction on the basis of such a defense.

Defendants would have this Court create a new rule of law, that particular federal judges have removal jurisdiction to determine the preclusive effect of their prior orders in any subsequent case filed in any other court. But Defendants have not and cannot cite any judicial or legislative authority for such an unwieldy proposition.

Although Defendants, in their filings and at the hearing before the MDL Panel, have attempted to evade the issues raised by their unwarranted assertion of federal question jurisdiction based on federal defenses, the following exchange illustrates Defendants' true position:

MR. RIVKIN: . . . There has to be a degree of finality. Somewhere down the line when you settle a class action, there has to be a degree of finality.

JUDGE SCHNACKE: But if you have a claim that arises in 1989 it is a little hard to have finality to that by some decree that is entered five years before.

* * *

MR. RIVKIN: . . . There is only one judge in the United States that has gone through over a million documents, hundreds of depositions, and 140-some-odd reported decisions from that Court on this case. I think it would be somewhat unfair to ask another judge to start over again in this . . . .

JUDGE POLLACK: The basis for federal jurisdiction?

MR. RIVKIN: Oh, yes. No. 1, all the people are members of the class. No. 2, did they opt out timely? No. 3, is the class action constitutional? No. 4, government contract defense, and so forth -- all of which were created by law.

JUDGE DILLIN: Those are matters of defense, are they not?

MR. RIVKIN: I would say that, arguably, the government contract defense, Your Honor, would be, arguably. But the class, I think, might be somewhat of a condition precedent to prove they are members of the class and whether that class is constitutional.

JUDGE DILLIN: They are arguing they are members of the class and they are arguing that they are not members of the class?

MR. RIVKIN: Yes. Either way . . . . I think there is a question; and, if there is a question, I think the transferee court has routinely had the right to decide this.

JUDGE POLLACK: Those are all defenses that you are going to assert in the Texas state court.

(Transcript of hearing, Ex. E, at pp. 100-01.)

C. Defendants Alleged Defenses Do Not Arise Under Federal Law.

Even if, for purposes of argument, Defendants' Government contractor and res judicata defenses could be bootstrapped into constituting elements of Plaintiffs' claims, rather than mere defenses to those claims, these defenses do not "aris[e] under the Constitution, laws, or treaties of the United States" as required by § 1331 for federal question jurisdiction. It is axiomatic that if Defendants' Government contractor and res judicata defenses do not arise under the Constitution, U.S. law, or treaty, then they can furnish no basis for federal question jurisdiction.

1. Federal Common Law Defenses Are Not Available In State Court.

Justice Scalia described the Government contractor defense established by Boyle as a rule of "so-called 'federal common law.'" 487 U.S. at 504. Under the separation of powers embedded in the U.S. Constitution, the "laws" of the United States are enacted only by Congress, and are only interpreted by the Courts. Therefore, "federal common law" - i.e., federal judge made law -- is not "law" in the Constitutional sense. Accordingly, Boyle did not establish that the "Government contractor defense" either arises under "the Constitution,

treaties, or laws of the United States" as required to invoke the original jurisdiction necessary for removal, see 28 U.S.C. § 1441(b), or that it satisfies the similar language of the federal question definition in § 1331.

Moreover, no legal rule is binding on state courts by force of the Supremacy Clause of the U.S. Constitution, Art. VI, Sec. 2 unless it fits within this same definition. Cf. Hart, Relations Between State and Federal Law, 54 Colum. L.Rev. 489, 500 (1954) (common law making, in the broad sense, not included among Article III powers) with Article VI, Sec. 2 (description of law that is "Supreme" uses language equivalent to that of Article III, Sec. 2). Unlike an Act of Congress, "federal common law" could only limit the enforceability of state rules of liability normally applied in federal courts under the Rules of Decision Act, 28 U.S.C. § 1652, but not necessarily limit the enforceability of state rules of decision in the state courts. See Boyle, supra, 487 U.S. at 507, n.3.

Federal courts have not traditionally been thought to have law-making power under the Constitution superior to that of the states. Whether "so-called 'federal common law'" rulings have direct preemptive effect under the Supremacy Clause, or instead possess only such persuasive value as precedents from any other common law jurisdiction, is still an open question. See, e.g., Felder v. Casey, 487 U.S. 131, 140 (1988) (federal common law rules "not dispositive . . . where

the question is not one of adoption but of pre-emption of state law"). That the Felder Court found a detailed analysis of the impact on federal policy necessary, rather than simply preempting a state law that conflicted with a federal common law limitations of actions rule, suggests that federal common law does not necessarily, without more, replace state law in state court. See also id. at 162 (O'Connor, J., joined by Rehnquist, C.J., dissenting, indicate that the preemptive effect of federal common law is still an open question: "assuming arguendo that state court must apply the same" § 1983 limitations of actions rule as is adopted by federal common law). In Boyle, the Court expressly reserved the question of the preemptive effect of the federal common law Government contractor defense. 487 U.S. at 507 n.3.

If this reading of the Supreme Court's decisions in Boyle and Felder is correct, then the newly created federal common law "Government contractor defense" which Defendants plan to raise would not necessarily be available in Texas state court except pursuant to its adoption by Texas as state law. Otherwise, the U.S. Supreme Court would have to rule that the truncation of state causes of action for Agent Orange injuries by this defense, in state courts, is necessary to implement federal policies derived from the Constitution, treaties or statutes. This the Supreme Court has not done. Creating new federal common law for enforcement as rules of decision in the

federal courts is not tantamount, in a federal system, to dictating substantive rules of law which the states must enforce in their own courts in an area of law traditionally occupied by the states. Judicial power to do the former does not necessarily include power to do the latter. Indeed it has long been assumed, under the Supremacy Clause, that only Congress can do the latter, short of an amendment to the U.S. Constitution, and it is far from clear that a majority of the Supreme Court in Boyle, Felder, or any other case, has abandoned this traditional view of the separation of powers.

Therefore, in a Texas state court, the Government contractor defense could only arise under state law and could not furnish a federal question for purposes of removal.

2. A Res Judicata Defense, If Any, Would Arise Under State Law In This Case.

The law of res judicata or preclusion applicable to a federal judgment of dismissal, rendered pursuant to diversity jurisdiction on the basis of state law, is that of the state whose substantive law was applied, see Dupasseur v. Rocherau, 88 U.S. (21 Wall) 130, 22 L.Ed. 588 (1874), Headnote 3 (written by author of opinion), which in the case of a Texas plaintiff should be Texas law.[9/] As one astute commentator has noted

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9/ Cf. Weston Funding Corp. v. Lafayette Towers, Inc., 550 F.2d 710, 713 n.3 (2d Cir. 1977). This does not mean

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"it is extremely difficult, under a traditional federal common law analysis or a Rules of Decision Act approach, to justify . . . across-the-board uniform federal preclusion rules for diversity judgments adjudicating matters of state substantive law." S. Burbank, Interjurisdictional Preclusion And Federal Common Law: Toward A General Approach, 70 Cornell L. Rev. 625, 636 (1985). Cf. Walker v. Armco Steel Corp., 446 U.S. 740 (1980) (state tolling statute applies in federal diversity case) with Burbank, op. cit., at 631, n.28 (rules for limitation of actions and for preclusion are comparable since they have a common purpose).

The same rule should apply a fortiori where, as here, state claims are settled in federal court. No principle of federal law is implicated in such a settlement. Accordingly, Dow's res judicata defense would depend upon state rather than federal law, and therefore could not present a federal question for removal purposes in any event.

9/ [Footnote Continued From Previous Page]

that the state court's application to a federal diversity judgment of state principles of res judicata is not deemed a "federal question" under Article III of the U.S. Constitution solely for purposes of review by the U.S. Supreme Court. See Deposit Bank v. Frankfort, 191 U.S. 499, 515-17 (1903).

CONCLUSION

No element of Plaintiffs' claims in this lawsuit arises under any federal law whatsoever. Defendants' alleged federal defenses, had they been presented in Defendants' Answer, would not even be clearly "federal" in nature, let alone sufficiently integrated with Plaintiffs' state claims to convert Plaintiffs' state causes of action into federal causes of action for purposes of the "complete federal preemption" corollary of the well-pleaded complaint rule. That rule has long since established that federal defenses, such as the res judicata and Government contractor defenses, provide no basis for federal jurisdiction. Like any other Defendants in state court, Defendants should present any federal defenses they may have, along with their state defenses, to the Texas state court where these Texas claims belong.

Because no basis exists for federal subject matter jurisdiction, Defendants' removal of this action from state to federal court was improper. Moreover, in light of controlling precedent which clearly denies federal question jurisdiction over this type of claim, and Defendants' involvement in that case, costs and expenses, including attorney fees, are appropriate under 28 U.S.C. § 1447(c), F.R.C.P. 11, and Local Rule 25(a). Four Keys Leasing & Maintenance Corp. v. Simithis, 849 F.2d 770 (2d Cir. 1988).

Respectfully submitted,

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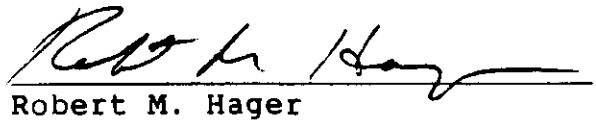
By: 

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