UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ELIZABETH SEWELL, et al, **Plaintiffs,** **v.** **SEWERAGE & WATER BOARD OF NEW ORLEANS, et al.,** **Defendants.**	**CIVIL ACTION NO.: 2:15-cv-03117** **SECTION "N"** **JUDGE: Hon. Kurt Englehardt** **DIVISION (3)** **MAGISTRATE: Hon. Daniel E. Knowles**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO SEVER AND REMAND

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Federal Rules, and Constitutional Articles

Treatises

MAY IT PLEASE THE COURT:

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The 71 Plaintiffs,[1] Elizabeth & William Sewell, *et al.* ("Plaintiffs"), are home and business owners in the Carrollton and Uptown Neighborhoods of New Orleans. They live adjacent to the Drainage Project (the "Project") being built by Defendant, the Sewerage & Water Board of New Orleans ("SWB"), on and around Claiborne, Jefferson, Napoleon and Louisiana avenues.

Plaintiffs' purely state law claims arise out of substantial structural damage to their homes, and obstructed access to homes and driveways for years, resulting from the knowingly destructive methods used by SWB to construct the Project. Construction vibrations and lowering of the water table have destabilized the ground beneath the homes causing foundations to sink and buckle, with corresponding damage to floors, walls, roofs, ceilings, plumbing and sewer lines.

Plaintiffs have brought suit in state court against one party only - the SWB - which has asserted a third party claim for indemnity against the two general contractors for the Project, B&K Construction Co., LLC ("B&K") and Cajun Construction, LLC ("Cajun"). B&K has responded to the SWB Petition by alleging the "Federal Contractor" defense and removing to this Court under the authority of 28 U.S.C. 1442 (a) (1).

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1 Plaintiffs' First Amended Petition lists 71 Plaintiffs; a pending Second Supplemental and Amending Petition lists 126.

The applicable facts and law compel severing the Plaintiffs' claims and remanding that component of the case back to the Civil District Court for the Parish of Orleans where it was originally filed. Plaintiffs' claims do not give rise to federal court jurisdiction, and B&K's Third Party removal under § 1442(a)(1) creates discretionary supplemental jurisdiction. The Supplemental Jurisdiction Statute, 28 U.S.C. § 1367, instructs that jurisdiction may be declined when, as here, Plaintiffs' claims raise complex issues of state law, substantially predominate over the removing third party defendant B&K's federal contractor defense, and compelling reasons of fairness, judicial economy, and convenience are served.

Severing and remanding is also authorized under FRCP Rules 14 (a) (4) and 21. Plaintiffs' claims and the removed third party dispute do not arise out of the same transaction or occurrence, do not present common questions of law or fact, and require different witnesses and documentary proof for the separate claims. Severance and remand of Plaintiffs' claims would promote judicial economy, avoid prejudice, and, and prevent forum shopping.

As demonstrated below, when the foregoing factors are present, applicable law authorizes this Court to decline supplemental jurisdiction, sever the Plaintiffs' claims, and remand the claims to the Civil District for the Parish of Orleans where the case was originally filed.

II. FACTUAL BACKGROUND

Plaintiffs' state law claims are based upon damage inflicted by the over one billion dollar Drainage Project (the "Project") being constructed by the SWB throughout the Uptown Neighborhood of New Orleans. See, Exhibit "1" to the Declaration of Joseph M. Bruno attached hereto. Originally represented to take two years to finish, it is now years overdue and has created a crisis: Plaintiffs' homes and neighborhoods now resemble disaster areas.

Callously indifferent to Plaintiffs' plight, the SWB has ignored its decade-long history of damaging homes using these same methods, and refuses to take steps to protect Plaintiffs' homes and businesses despite their pleas for assistance. Defying logic and compounding the misery, the SWB has determined to conduct the enormous Project simultaneously on the four major avenues crossing Uptown. This has created a disaster for the Plaintiffs and their fellow neighbors.

The Plaintiffs' neighborhoods are now host to the relentless, concussive hammering of pile driving equipment, jackhammers, jet grouting, clanking 70-ton cranes, roaring earthmoving equipment, and gigantic trucks traveling the streets mere feet from the front doors of Plaintiffs' homes. The noise and house-shaking vibrations last all day long, from early morning until late in the evening. Massive, gaping, miles-long open pits surrounded by traffic barriers and heavy equipment have replaced the grass-lined and tree-filled neutral grounds used by the communities.

As a consequence, Plaintiffs' homes have broken foundations, sinking floors, cracked interior and exterior walls, broken sewer mains, and doors and windows that no longer operate due to building movement. Second story floors shudder and buckle in response to relentless pounding of pile drivers. Three-story tall cement silos are placed directly in front of homes bellowing unknown chemicals.

The Plaintiffs are suffering. They have no place to hide. This is particularly true for elderly residents, some who have been forced out of their homes. Street blockages prevent them from driving home or using their driveways. Those Plaintiffs that have stayed face treacherous walks for several blocks through muck and mire, around machinery and equipment, just to get home. Small business owners established for years have reported catastrophic loss of revenues and decreased rents resulting from obstructed customer/tenant access.

III. PROCEDURAL HISTORY

Plaintiffs' initial Petition for Damages was filed on May 11, 2015, in the Civil District for the Parish of Orleans; the First Supplemental and Amending Petition for Damages was filed on June 10, 2015, naming a total of 74 Plaintiffs. Both Petitions name the SWB as the sole Defendant. Premised upon and incorporating Article 1, Section 4 of the Louisiana State Constitution, three Causes of Action are alleged: 1) Inverse Condemnation; 2) Strict Liability (Pile Driving) under La. CC Art. 667, and 3) Negligence (Failure to Protect from Foreseeable Harm) under La. CC Arts. 2317, 2317.1.

Defendant SWB's Answer and Third-Party Demand against B&K and Cajun were filed and served on or about July 2, 2015. A Second Supplemental and Amending Petition naming 126 Plaintiffs' was prepared for filing and submitted to Defendant's Counsel on July 20, 2015, along with a request to stipulate to file without leave of Court. However, the matter was removed to this Court first, on or about July 23, 2015, when B&K filed its response to the SWB's Third Party Demand alleging the "Federal Contractor" defense and removing under the authority of 28 U.S.C. 1442 (a) (1).

IV. THE SWB AND NO OTHER PARTY IS LIABLE FOR PLAINTIFFS' DAMAGES

In *Holzenthal v. Sewage and Water Board of New Orleans*, 950 So.2d 55 (La. App. 4th Cir. 2007), the SWB was held liable under the same liability theories alleged by Plaintiffs here for exactly the same kind of drainage project, and inflicting exactly the same kind of damage to homes in the Broadmoor Neighborhood over ten years ago. Plaintiffs submit that *Holzenthal*, *supra*, is controlling precedent for their claims in this case and is instructive. There is virtually no material distinction between the facts of that case and those present here.

In *Holzenthal*, *supra*, the SWB was installing an underground box culvert on Napoleon Avenue in the Broadmoor Neighborhood beginning in May 2000, just like the one damaging Plaintiffs' homes. There, like here, the homes suffered substantial damage due to heavy equipment-caused vibration, and ground settlement caused by drawing down nearby water tables. Some houses had significant cracking, and in others, porches collapsed. There, like here, streets were blocked, access obstructed, and the homeowners suffered daily as they watched their houses deteriorate amidst the noise and debris.

The *Holzenthal* plaintiffs sued only the SWB; no other parties were named as defendants. The Fourth Circuit Court of Appeals upheld the trial court's ruling that the SWB was liable on the following Causes of Action:

> 1. Inverse condemnation because damages sustained by the plaintiffs were the necessary consequence of the project, and it was undertaken for a valid public purpose; 950 So. 2d at 61.
>
> 2. Strict liability because the SWB was engaged in the ultra-hazardous activity of pile-driving activity that damaged the plaintiffs' homes; *Id*. at 66
>
> 3. Failure to protect from foreseeable harm under La. CC Arts. 2317, 2317.1, since the SWB knew that damage was likely yet did nothing to protect the homeowners. *Id.* at 70.

Every single defense raised by the SWB in *Holzenthal* was summarily rejected. These included: denying that the project was the SWB's responsibility and claiming that it was merely a "local sponsor"; driving steel sheet metal piles into the ground was not pile driving; that inverse condemnation was erroneously imposed; that construction vibrations or dewatering could not cause the damage to the homes; that the plaintiffs' damages were not directly attributable to the project; and that the contractors were to blame.

The *Holzenthal* court unambiguously found that the SWB knew these damages were going to occur and went ahead with its destruction anyway:

> "Despite the anticipation of property damage, SWB proceeded with the Project **without changing** its construction methodology…."
>
> "The SWB made a **conscious decision to proceed** with the Project without change, having balanced the cost of correction against the risk of damage to the neighbors." …
>
> "When monitoring revealed that construction activities were causing 'profound impact well beyond the limits of construction,' SWB **did nothing to correct** the problem." 950 So.2d at 70 (emphasis added).

Logic and reason would suggest that the SWB take steps to avoid repeating the experience of the *Holzenthal* case. This was not to be the case, however. In April, 2010, *two years before* construction began on this Project, the SWB signed an agreement warning that damages to the Plaintiffs' properties were going to occur. The SELA Final Programmatic Agreement ("Agreement"), dated April 30, 2010 and signed by the SWB Superintendent Joseph Becker, cautioned that "[t]he potential exists for indeterminate damages to properties or structures…as a consequence of construction vibrations" in the affected Uptown neighborhoods. *See*, Exhibit "2" to the Declaration of Joseph M. Bruno attached hereto.

The Agreement even calculates the "Construction Impact Zone ("CIZ") for the Project, the even larger Area of Potential Effect ("APE"), and in case there was any doubt, featured aerial photographs outlining in red the specific properties where damage was expected to happen. See, Ex. 2 to Bruno Declaration. Plaintiffs' homes and businesses are directly within these designated damage areas.

Inexplicably ignoring the rights of the Plaintiffs and callously refusing to change is construction methods, the SWB plunged ahead with its Project, and the predicted damage to Plaintiffs' homes and businesses followed.

The SWB's civil engineering expert in *Holzenthal* was Leonard Quick. During discovery, Mr. Quick testified in his deposition that construction vibration and de-watering could not have caused the damage to the plaintiffs' homes. *Id*. at 72. This testimony allowed the contractors in *Holzenthal* to prevail on their summary judgment motions asserting the immunity provided by the federal contractor defense.

At trial, however, Mr. Quick was so profoundly impeached on these opinions that the Court concluded: "Quick's testimony lacks credibility, and this Court should not rely upon his opinions in forming the Court's Judgment." *Id.* at 74. These same opinions form the basis for the SWB's third party demand that is the subject of this Motion.

V. THE SUPPLEMENTAL JURISDICTION STATUTE PERMITS THIS COURT TO DECLINE JURISDICTION AND SEVER AND REMAND PLAINTIFFS' CLAIMS

Plaintiffs' purely state law claims do not give rise to federal court jurisdiction. Removal under § 1442(a)(1) creates supplemental jurisdiction that is discretionary and may be declined if specific factors are present. The Supplemental Jurisdiction Statute, 28 U.S.C. § 1367, provides:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve joinder or intervention of additional parties.
>
> . . .
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if
> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367.

Application of this Statute was explained by the standard-setting decision of this Court in *Borden v. Crocker,* 853 F. Supp. 1322 (E.D. La. 1994). *Crocker* was an asbestosis case involving thousands of exposed workers with state law injury claims. The defendant was Owens Corning Fiberglass ("OCF"). OCF filed a Third Party demand against Westinghouse Electric Corporation ("Westinghouse"). Alleging that it was a federal officer, Westinghouse removed to District Court based upon 1442(a)(1). Plaintiffs thereafter filed a Motion to Remand.

One of the issues in *Crocker* was whether or not the Court should exercise jurisdiction over the plaintiffs' state law claims and if so, whether it had discretion to decline jurisdiction, sever the state claims, and remand them. The Crocker Court conducted an exhaustive examination of the Supplemental Jurisdiction Statute, consulted learned treatises, and surveyed federal decisions where courts had declined supplemental jurisdiction over state-law damage claims and remanded them to state court.

Distilling the 28 USC 1367(c) (1)-(4) analysis to its essence – that a district court should decline jurisdiction if just one of the four circumstances listed are present - the Crocker Court held that:

> § 1367(c) grants the district court the discretion to decline supplemental jurisdiction if it determines that one of four enumerated circumstances are present….It is apparent that, while allowing federal courts to take supplemental jurisdiction over state law claims, Congress intended for federal courts to have the discretion to decline such jurisdiction when circumstances so warrant.. *Id* at 1328 (emphasis added).

The *Crocker* court noted that the word "may" found within 28 U.S.C. § 1367 (c) permits the district court to weigh and balance all factors on a "case-specific analysis" in exercising discretion and should reserve declinations of jurisdiction for situations with "compelling

reasons." *Id*. at 1328-29 (citing *Practice Commentary,* 28 U.S.C. § 1367, 829, 835-36 (West 1994). The Court further determined it must consider "judicial economy, convenience, and fairness to the litigants" in reaching a decision on declination of supplemental jurisdiction. *Id*. at 1329.

As shown below, the factors enumerated in 28 U.S.C. § 1367 (c) weigh in favor of the Court declining to exercise supplemental jurisdiction over Plaintiffs' state law claims in this case. Accordingly, Plaintiffs' claims should be remanded to the State Court.

1. **Plaintiffs' Claims Involve Complex State Law Issues**

Plaintiffs' claims raise complex issues of Louisiana State Constitutional law. Directed against the SWB and based upon its status as a "stand alone" governmental entity and sponsor of the Project, Plaintiffs' claims are premised upon and arise out of Article 1, Section 4 of the Louisiana Constitution, which reads in part:

> Every person has the right to acquire, own, control, use, enjoy, protect and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.
>
> Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. La. Const, Art 1, Section 4.

The U.S. Supreme Court affirmed the declination of supplemental jurisdiction over claims that involved difficult questions of state law and " 'which state court decisions are not legion,' " Moor v. County of Alameda, 411 U.S. 693, 716, 93 S. Ct. 1799 (1973).

Here, the state law issues raised by the inverse condemnation claims in Count 1 of Plaintiffs' Petition will be: (1) determination if a recognized species of property right has been affected; (2) if it is determined that a property right is involved, decide whether the property has been taken or damaged in a constitutional sense; and (3) determine whether the taking or damaging is for a public purpose under Article I, § 4.*Constance v. State*, 626 So. 2d 1151, 1157 (La.1993) (using C.C. arts. 667 and 668, which impose legal limitations on a landholder's right of ownership, to consider whether property was taken or damaged under Art. I, § 4);*Avenal v. State of Louisiana and Dept. of Nat. Res.,* 886 So.2d 1085, 1103 (LA. Sup. Ct. 2004).

Likewise, Plaintiffs' claims for strict liability (Pile Driving) under La. CC Art. 667, and negligence (Failure to Protect from Foreseeable Harm) under La. CC Arts. 2317, 2317.1, raise unique state law claims unrelated to the contractual disputes raised by the third party demand. Plaintiffs submit that these complex state law issues are sufficient to decline jurisdiction under 28 U.S.C. 1367 (c)(1).

2. <u>Plaintiffs' Claims Substantially Predominate</u>

The state law claims of the 71 (soon to be 126) Plaintiff home and business owners are for structural damage to their property, obstructed access, damage to personal property, loss of business revenue, and emotional distress. These claims substantially predominate over the single federal defense raised by B&K because they are exclusively derived from state law, are not asserted against the third-party defendants, are completely premised upon Louisiana Constitution Article 1, § 4, and are distinct and foreign to the third-party claims.

A state claim is said to "substantially predominate" over a federal claim if it "constitutes the real body of a case, to which the federal claim is only an appendage." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 727 (1966). If "state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals." *Id*. at 726-27.

A supplemental state claim "substantially predominates" for purposes of this analysis if: 1) it is more complex than the federal claim; 2) it requires more judicial resources to adjudicate than the federal claim; 3) it is more salient as a whole than the federal claim; or 4) a substantial quantity of evidence supports the supplemental claim that would not be relevant to the federal claim. *See*, Moore's Federal Practice (3d ed.) §§ 106.05[4], 106.65.

The above standards are instructive. Like *Crocker*, all claims asserted by the Plaintiffs here are derived from state law and none have been asserted against the third-party defendant. Unlike *Crocker*, however, all claims in the present case are premised upon Louisiana Constitution Article 1, § 4 and are not based in tort or contract, making an even sharper distinction between the Plaintiffs' constitutional claims and the SWB's third-party claims based in contract.

Applying Professor Moore's test, and as in *Gibbs*, *supra*, Plaintiffs' claims are clearly the crux of this case, while the B&K defense is a "mere appendage." The numerical quantity and extent of Plaintiffs' claims greatly out-number B&K's single federal contractor defense; the number of Plaintiffs testifying as to their damages and quantity of evidence supporting those claims will require more judicial resources to adjudicate; Plaintiffs' claims are more prominent and conspicuous; Plaintiffs' issues of causation and damages are irrelevant to B&K's defense

which entails comparison of the "as built" Project with the original plans and specification, and contractual indemnity issues with the SWB.

These considerations establish that Plaintiffs' claims "substantially predominate" for purposes of declining jurisdiction pursuant to 28 U.S.C. 1367 (c)(2).

3. Compelling Reasons of Fairness, Prejudice to Plaintiffs, and Judicial Economy

Compelling reasons of fairness, avoidance of prejudice, and judicial economy raised by this case are all served by severing Plaintiffs' action and remanding to the State Court.

a. Fairness:

It is unfair to make the Plaintiffs suffer in wrecked homes and ruined businesses while the SWB pursues its strategy of delay. In *Crocker*, the Court found significant fairness issues were implicated by the fact that the numerous plaintiffs might not see their actions resolved for many years. As is the case here, none of the plaintiffs in *Crocker* asserted claims against the third-party defendants. The Court found "no reason to believe that, in terms of expediency and efficiency, [the plaintiffs' claims] ought to be in federal court…" *Id*. at 1330.

Delay is part of the SWB's litigation strategy: it is purposely injecting years-long delay into the litigation process for the transparent purpose of economically weakening Plaintiffs and lessening their resistance. Third party demands like the one before the Court are a critical part of this strategy. Although the SWB lost on every single one of the identical third party claims in *Holzenthal*, it is pursuing the same failed path again here, using the same discredited expert and filing the same third party demands that are doomed to eventually fail for the same reasons as before.

Success on the merits is not the objective; delay is – the Third Party Demands allow for the entry of a host of parties with competing interests all to be litigated: jurisdictional arguments,

federal immunities, contractual disputes, and technical claims of every sort, none of which go toward resolution of Plaintiffs' claims. The resulting delay will be monumental. A tidal wave of discovery will be discharged. Depositions will go on endlessly. Appeals and writs of every kind will be pursued. Proof of this is again found in *Holzenthal*, which took over seven years from the initial damages to resolve.

This Court has the statutory authority to prevent this by severing Plaintiffs' claims and remanding the claims to the State Court. This is the fair and appropriate basis for declining jurisdiction pursuant to 28 U.S.C. 1367 (c)(4).

b. Prejudice

Neither the SWB nor B&K will be harmed if the Plaintiffs' claims are severed and remanded. Separate trials preserve all rights, claims, theories, and arguments either Party chooses to make. They will not be harmed physically, financially, or otherwise.

Contrast this with the Plaintiffs, however, who will suffer immensely if required to endure the certain delay the Third Party claims will bring. If allowed to remain, the case will follow multiple directions for years. Many elderly Plaintiffs are likely to die before their case ever comes to trial. Others will suffer physically, emotionally, and financially by living in broken homes and operating businesses in damaged buildings for years.

Extending supplemental jurisdiction over the Plaintiffs' state law claims will almost assuredly bring in more third-party demands and reconventional demands. Trying the third-party demands along with the main demand will likely result in a timeline similar to the *Holzenthal* case. Declining supplemental jurisdiction over the state law claims under 28 U.S.C. 1367 (c)(4) will prevent this unjust result.

c. Judicial Economy.

Case management and judicial economy will benefit from severance. The Fifth Circuit has recognized that a district court's retention of a case would not serve judicial economy when the case is in the early stages of litigation. Indeed, the Fifth Circuit has held that remand is proper in light of judicial economy where the case had been in federal court for less than a month and a scheduling order had not yet been issued. *See e.g. Hicks v. Austin Independent Sch. Dist.*, 564 Fed .App'x 747, 749 (5th Cir. 2011).

Likewise, this case is in very early stages of litigation, having been in federal court for less than a month with no scheduling order or hearings having taken place. It is a virtual certainty, however, that the SWB's third party claims will spawn more cross-claims and counter-claims, as B&K is certain to bring in sub-contractors. These sub-contractors, in turn, are certain to assert their own cross-claims. Insurance carriers will become involved. The roster of parties will quickly expand in size. Discovery disputes will be endless. Court management of the numerous parties, with their conflicting and competing interests, will very quickly become an issue. Delay will be measured in years.

Severing the Plaintiffs means that a potentially large and difficult to manage multi-party case is reduced in size and scope. Fewer Parties will be involved, thus fewer factual and legal issues, fewer witnesses, fewer discovery disputes, a shorter trial time, and potential confusion by the jury reduced. Orderly procedure and fairness are thus clearly best served by severance under 28. U.S.C. 1367 (c)(4).

VI. THE FEDERAL RULES OF CIVIL PROCEDURE AUTHORIZE THE COURT TO SEVER AND REMAND PLAINTIFFS' CLAIMS

Under the Federal Rules of Civil Procedure, any party or the Court can move to sever a third party claim or order a separate trial. Under Federal Rule of Civil Procedure 14(a)(4): "Any party may move to strike the third-party claim, to sever it, or to try it separately." Likewise, Rule 21 grants district courts the authority to "sever any claim against a party." The discretion to sever is broad. *Brunet v. United Gas Pipeline Co*.,15 F.3d 500, 505 (5th Cir. 1995); *Xavier v. Belfour Grp. USA, Inc.,* 585 F. Supp. 2d 873 at *3 (E.D. La. 2008).

Pursuant to 28 U.S.C. § 1447(c), a district court must remand a case "[i]f at any time before final judgment it appears that the district court lacks subject-matter jurisdiction". 28 U.S.C. § 1447(c). Severing the Plaintiffs' claims here will eliminate any jurisdictional issues over the claims and allow for remand to the State Court. A district court may consider the following factors in order to determine whether claims should be severed:

(1) whether the claims arose out of the same transaction or occurrence;

(2) whether the claims present common questions of law or fact;

(3) whether settlement or judicial economy would be promoted;

(4) whether prejudice would be averted by severance; and

(5) whether different witnesses and documentary proof are required for separate claims. *Xavier, supra.*

Application of these five factors overwhelmingly favors severing Plaintiffs' claims.

1. Same Transaction or Occurrence

Although having a nexus with the SWB Project, Plaintiffs' damage claims and the B&K federal contractor defense do not arise out of the same transaction or occurrence. As discussed above in Section V.1, Plaintiffs' claims concern the SWB's status as a governmental entity, and seek damages arising out of the Louisiana Constitution Art. I, §4.

In contrast, B&K's federal contractor defense is based on a contract with the U.S. Army Corps of Engineers ("USACOE"). *See*, Removal Petition, pg.2, para. 4. The SWB alleges that it is a third party beneficiary to the same contract and entitled to indemnity from B&K and the USACOE. *See*, SWB Response to Plaintiffs' Petition, Pg. 17, para. 17.

Plaintiffs are not parties to the USACOE contract; the SWB and B&K dispute does not involve State constitutional issues. Accordingly, the respective claims do not arise out of the same transaction or occurrence.

2. Common Questions of Law or Facts

Plaintiffs' claims against the SWB, and B&K's federal contractor defense do not involve common questions of law or facts. The legal and factual test on Plaintiffs' inverse condemnation claims is set forth above in Sections V.1-2, discussing the complexity of these State Constitutional law issues, causation, and damages.

In contrast are the factual and legal issues raised by the B&K defense: factually, whether or not its work on the Project was done in accordance with the ACOE's plans and specifications. As a matter of law, a contractor on a state or federal project who complies with the project's plans and specifications is not liable for damages to the property of third parties. *Yearsley v. W.A. Ross Construction Co.,* 309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940). Comparison of B&K's work with the Project documents will necessitate multiple percipient and expert witnesses, and thousands of Project documents.

If B&K did deviate from the plans and specifications then contractual issues abound, including whether or not SWB is a third party beneficiary to the ACOE/B&K contract, and whether and to what extent it is entitled to indemnification.

Clearly, common questions of law and fact are not present between Plaintiffs' claims and the B&K defense.

3. Promotion of Judicial Economy

The factors and considerations discussing the benefits to case management and judicial economy resulting from severing and Plaintiffs' claims are above in Section V.3

4. Avoidance of Prejudice

The harm befalling Plaintiffs and lack of harm to B&K should the state law claims be severed and remanded, is discussed above in Section V.4.

5. Different Witnesses and Documentary Proof are Required

Plaintiffs' claims and the SWB third party claim and B&K defense to the third party claim, all require different witnesses and different burdens of proof. In order to prevail, SWB has the burden of proving that B&K's professional engineering and contracting services were not performed with the same degree of skill and care exercised by others in the same profession in the same general area. *Greenhouse v. C.F. Kenner Assocs. Ltd. P'ship,* 98-0496, p. 7 (La.App. 4 Cir.), 723 So.2d 1004, 1008. In order to avoid involuntary dismissal of its third party demand against B&K, SWB has the burden of establishing a *prima facie* case by a preponderance of the evidence. Federal Rule of Evidence, Rule 301.B&K has the burden of establishing that it complied with the plans and specifications of the ACOE contract in order to establish its immunity. *Yearsley v. W.A. Ross Construction Co., supra.*

In order to meet these burdens, the SWB and B&K will call numerous percipient witnesses and dozens of expert witnesses to testify. The volume of documentary proof for this one billion dollar Project will be immense. *Daubert* hearings regarding the "preliminary assessment" of the admissibility of expert testimony will be required. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 113 S.Ct. 2786 (1993).

Contrast these with the issues in a trial between Plaintiffs and the SWB involving liability, causation, and damages. *Holzenthal* establishes liability. Plaintiffs themselves will

testify as to ownership and damage. Expert witnesses will be necessary for causation and for damages regarding: cost of repair, diminution in value/loss of use, moving expenses, mold remediation/removal, damage to personal property, and emotional distress. Documentation will consist of title documents establishing ownership of each home, and reports and photographs from each of the experts pertaining to his distinct area of expertise.

Clearly, different witnesses and documentary proof are required for the parties' respective claims and defenses, supporting severance and remand as authorized by the above authorities.

VII. SEVERING PLAINTIFFS' CLAIMS WILL PROHIBIT FORUM SHOPPING

The SWB's third party claims are thinly disguised efforts intended to create grounds for removal to Federal Court and constitute blatant forum shopping - an effort to find a Court not inclined to follow the precedent set in *Holzenthal, supra*. This is because the SWB was defeated on *every one* of its identical third-party claims in *Holzenthal*, and where verdicts averaging over three hundred thousand dollars per home were upheld on appeal.

Forum shopping is to be prevented by courts. Decisions and authorities on this maxim abound. In *Hanna v. Plumer*, the U.S. Supreme Court held that forum-shopping "is to be discouraged along with avoidance of the inequitable administration of the laws." 380 U.S. 460, 468 (1965). In *Marchesani v. Pellerin-Milnor Corp*., 269 F.3d 481 (5th Cir. 2001), the Fifth Circuit reiterated, saying "opportunistic forum shopping is to be discouraged." Louisiana Civil Code, article 3515, Revision Comment (c) is in accord, stating that policies of discouraging forum shopping are "universally acknowledged."

Holzenthal provides a roadmap for what comes next if the third-party claims aren't severed here: B&K and Cajun will cross-claim against the SWB and the USACE. Multitudes of

subcontractors are then joined. Jurisdictional issues and federal immunities are then litigated for years. Meanwhile, the Plaintiffs sit in wrecked homes and businesses for years.

Defendant's forum shopping harms the ones least able to withstand it—the innocent Plaintiffs with their homes and qualities of life sinking like the damaged foundations of their houses. This Court has the statutory authority to prevent this by severing Plaintiffs' claims and remanding them to State Court. This is the fair and appropriate result.

VIII. CONCLUSION

Plaintiffs' dire circumstances cry out for this Motion to be granted. Ten years after Katrina, the Plaintiffs are horrified to now find their homes and businesses, often newly renovated or refurbished, in the midst of another disaster. This time the damage comes from the indifferent hand of the SWB, a branch of the City they love and choose to call home.

There is no good reason why these residents have to or should endure the kind of property damage that the SWB Project is causing to their homes through no fault or decision of their own. Delayed years beyond original dates of completion, their homes and neighborhoods are being wrecked by the Project. They are being forced to live in damaged homes and pay for their own repairs, for years and years with no end in sight. No one, and certainly not the SWB, has stepped forward to help them.

Requiring Plaintiffs to remain in this case while Defendant's third party claims are litigated will have the unquestionable result of delaying Plaintiffs' claims for years. The physical, emotional and financial toll that this will bring to bear on the Plaintiffs is

immeasurable. This is not right. The balance of interests is not even close – there is simply no harm by severing the Plaintiffs' claims and remanding to State Court. Justice, reason, and common sense require this.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of August, 2015, I electronically filed the foregoing pleading with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all parties.