UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ELIZABETH SEWELL, ET AL	*	CIVIL ACTION NO. 15-3117
	*	
VERSUS	*	JUDGE KURT D. ENGELHARDT
	*	
SEWERAGE & WATER BOARD OF NEW ORLEANS, ET AL	*	MAG. DANIEL E. KNOWLES
	*	
	*	SECTION "N"(3)
	*	

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OPPOSITION OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS TO PLAINTIFFS' MOTION TO SEVER AND REMAND

Defendant and Third Party Plaintiff, Sewerage and Water Board of New Orleans ("SWB"), respectfully submits its Opposition to Plaintiffs' Motion to Sever and Remand (Rec. Doc. 7). This is a suit and third-party demand about property and other damages stemming from multiple construction projects being performed *not* by the SWB, but by contractors to the United States Army Corps of Engineers ("USACE"). The allegedly offending construction activities, including dewatering, pile-driving, and the like, are *not* being conducted or supervised by the SWB, but by USACE and its' contractors. Plaintiffs' Motion and petitions ignore this salient fact.

As such, there is significant, if not complete, overlap between the allegations in Plaintiffs' multiple Petitions and the Third Party Demands of SWB. This overlap was proven by plaintiffs' oft-cited *Holzenthal* decision, which contemporaneously decided the property-damage claims of three plaintiffs against the SWB, and SWB's near-identical third-party demand against the USACE contractor, using the same evidence. Severing and remanding the claims against SWB would prejudice SWB and the third-party defendants as it would create a dual-track litigation of the same facts and liability issues in two different forums, potentially subjecting

SWB to conflicting and irreconcilable decisions. There is no justification to sever plaintiffs' petitions from SWB's third-party demands when the issues in both – causation and liability for plaintiffs' property damage claims from construction of the many phases of the SELA Project, are identical.

Finally, and contrary to plaintiffs' assertions, the only issue that has been resolved in over ten plus years of SELA related litigation is not liability, but the appropriateness of the federal forum to litigate these damage claims. Since *Holzenthal*, multiple judges[1] in this district have upheld this Court as the proper forum and presided over dozens of SELA lawsuits featuring over 250 plaintiffs and two proposed class actions, including one current in *Crutchfield v. SWB*.[2]

PROCEDURAL HISTORY

Plaintiffs' have filed two petitions with 71 plaintiffs, and indicated they will be filing an additional petition for a total of 126 plaintiffs, each claiming property and other damages resulting from one of seven phases of the Southeast Louisiana Urban Flood Control Project ("SELA"). Plaintiffs' original petition was limited to three plaintiffs who live near the two project phases on Jefferson Avenue -- Jefferson Avenue Phase I, which runs from South Claiborne Avenue to Dryades Street, and Jefferson Avenue Phase II, proceeding from Dryades to Constance Street. Accordingly, SWB filed a Third Party Demand against the two contractors selected by the USACE: B&K Construction Co., LLC ("B&K"), who is constructing Jefferson Phase I, and Cajun Constructors, LLC ("Cajun"), who is constructing Jefferson Phase II.

B&K filed a Notice of Removal based on the federal officer removal statute, 28 U.S.C. §1442(a), on Friday July, 31, 2015. SWB requested and received on Tuesday, August 4 issuance

[1] Judges Duval, Lemelle, Berrigan, and Feldman, *infra*. None have severed the petitions from the third-party demands as plaintiffs request.
[2] No. 13-4801.

of a summons on Cajun, and the next day sent Cajun a request to waive service of SWB's third-party demand. On August 4 plaintiffs also filed their Motion to Sever and Remand at issue.

SWB answered plaintiffs' First and Supplemental Amending Petition for Damages on August 11. That petition adds 68 plaintiffs from addresses throughout the Uptown and Carrollton/ Hollygrove neighborhoods and increased the number of SELA construction phases implicated from two to seven. Accordingly, on August 25 SWB filed its' Third Party Demand against the USACE contractors for the other five Uptown phases, adding Boh Brothers ("Boh")[3] and Linfield, Hunter, and Junius ("LHJ")[4], and again naming Cajun and B&K (collectively "contractor-defendants"). Plaintiffs have now implicated all seven current Uptown SELA projects, each phase with its own USACE contract, contractor, subcontractors, start date, plans and contract specifications, means and methods of construction, equipment utilized, and more.

Plaintiffs' claim they have been damaged by the construction acts, actions, and activities from each of these seven phases of the SELA Project, including from pile-driving, continuous vibration, water drainage and dewatering, equipment hauling, and traffic pattern changes. Rec. Doc. 1-2. They raise three counts against the SWB: 1) inverse condemnation; 2) strict liability under Louisiana Code of Civil Procedure Article 667, asserting that "the SWB is engaged in pile driving" (*Id.*, ¶ 22) and the construction sites are under the custody and garde of SWB (*Id*., ¶21); and 3) multiple allegations of negligence, including under Louisiana Civil Code Articles 2317 and 2317.1, for SWB's "acts, actions, activities and work at the construction site", (*Id*., ¶27) and SWB's alleged responsibility for "all" construction activities undertaken in furtherance of the SELA Project. (*Id*., ¶¶28,29). Plaintiffs' do not limit their negligence claims against the SWB to

[3] Boh is constructing Napoleon Avenue Phases II and II, and the Louisiana Avenue Canal.
[4] LHJ is constructing Claiborne Avenue Phase I, Monticello Street to Leonidas Street.

pre-project activities, they are all-encompassing and seek to hold SWB liable in negligence for any and all project-related acts, regardless of who performed them.

SWB filed its' third-party demands against the multiple USACE contractors alleging 1) SWB is entitled to indemnity under Louisiana law, including for tort indemnity, by the true builders of the project if their actions caused plaintiffs' alleged damages; 2) breach of contract, asserting it is a third-party beneficiary to the general contracts between the USACE and the contractor-defendants; and 3) the negligence of the contractors, who performed the work the SWB is being sued on. Rec. Docs. 1-3, 14. SWB does not have a contract with, and is not suing, the USACE.

As of the filing of this Opposition none of the contractor-defendants have answered SWB's demands.

BACKGROUND

I. *HISTORY OF THE SELA PROJECTS*

Since originally being authorized by the Water Resources Development Act of 1996 (P.L. 104-303, Sec. 533), the United States Army Corps of Engineers ("USACE") has spearheaded the Southeastern Louisiana Urban Flood Control Project ("SELA"), partnering with state and local agencies to improve drainage capacity and prevent flooding in Orleans, Jefferson, and St. Tammany Parishes by constructing larger underground drainage culverts. In Orleans Parish several SELA projects in the Uptown/ Broadmoor area, including on Napoleon Avenue between Fontainebleau Drive and South Claiborne Avenue, were constructed and completed by 2003. Since Hurricane Katrina, SELA construction on Dwyer Road has been completed. These projects have been subject of property-damage litigation in federal court.

The current SELA Projects, including the seven Uptown phases implicated in the present suit, are being funded by appropriations from the United States Congress, through the USACE [Public Laws 110-252 (Jan. 30, 2008) and 110-329 (Sept. 30, 2009)], to the State of Louisiana for the express purpose of providing "hurricane protection, storm, and flood damage reduction" to the greater New Orleans area, and to achieve the required protection necessary to participate in the National Flood Insurance Program (NFIP).[5] The USACE is to report monthly to Congress detailing the allocation of these funds.[6] The contracts for each phase are being let out and administered by the USACE.

As cited by plaintiffs, USACE entered into a 2010 Programmatic Agreement ("2010 Agreement") with the Louisiana Coastal Protection and Restoration Authority ("CPRA") to construct the 14 remaining Orleans Parish SELA Projects.[7] CPRA was created and empowered after Hurricane Katrina by La.R.S. 49:213.1 to act as the local sponsor for construction, operation, and maintenance of all *hurricane, storm damage reduction, and flood control projects*, including those in the greater New Orleans area and southeast Louisiana. This 2010 Agreement was between the USACE, CPRA, and the Louisiana State Historic Preservation Officer, and concerned compliance with Section 106 of the National Historic Preservation Act. The document, and its contents and attachments, was prepared by USACE, not by SWB. While it was an invited signatory to the 2010 Agreement, there is no evidence SWB was involved in any decisions, input, definitions, determinations, plans, or maps attached thereto, including as to potential impacts.

[5] Public Law 110-252 (Jan, 30, 2008); 122 STAT. 2323, 2349.
[6] *See* id.
[7] Rec. Doc. 7-4, p.2 of 8.

II. *THE SEVEN CURRENT UPTOWN SELA PROJECTS*

Despite plaintiffs' characterizations, the SELA Project is not just one construction project, but consists of seven phases in the greater Uptown New Orleans area, each with a different contractor selected by the USACE, governed by its own USACE contract, and with seven different start dates, seven different sets of plans and specifications, and varying means and methods of construction. The seven current Uptown projects are also identified in Plaintiffs' Exhibit 7-3, which state the dates the contracts for each were awarded by the USACE.[8] The majority of these contracts were only awarded in the past two years, and construction on the Louisiana Avenue phase only recently commenced, and thus completion is not "now years overdue" as plaintiffs assert. A total of four different contractors were selected by and contracted with the USACE to build these seven phases: 1) B & K Construction is constructing two phases: Jefferson Avenue Phase I and S. Claiborne Ave. Phase II; 2) Cajun Constructors, LLC only Jefferson Avenue Phase II; 3) Boh, who is constructing three: Napoleon Avenue Phases II, III, and Louisiana Avenue; and 4) LHJ for S. Claiborne Avenue Phase I. The construction is intended to prevent recurring flooding and alleviate the effects of a 10 year rain event. A substantial portion, if not the majority, of this area flooded following Hurricane Katrina.

As evidenced in the removal affidavit by B&K through its' Vice-President, W. Blake Andrews (Rec. Doc. 1-7), B&K had a specifically numbered contract with the USACE for its work on Jefferson Phase I. Upon information and belief, there are seven distinct and different contracts, each the culmination of a bidding process whereby USACE advertised a contract

[8] While it appears this particular exhibit is only current as of September 2014, so as to update the Court and the parties on the current status, none of the projects have yet been accepted by the USACE as complete, thus meaning the prescriptive period for inverse condemnation takings claims has not begun to run under the Louisiana Constitution as to any phase.

solicitation, and allowed the responding contractors to bid on several alternatives[9], rendering no contract, including the equipment, methods, and means, identical.

Andrews' affidavit evidences that the contractors – *not* SWB – were in charge of selecting the methods of performing the construction, and that the USACE – *not* SWB – was responsible for supervising and monitoring the work. This is confirmed by the 2010 Agreement, which states that the USACE will provide vibration monitoring services and inform the contractors of concerns.[10] Andrews testified that B&K was "required to submit for USACE approval the proposed methods of performing the work." *Id*.,¶ 6. Further, B&K also had to submit for USACE approval the specific equipment it wished to use, and has to schedule preparatory meetings with USACE to review its' submittals over how the work would be performed. *Id*., ¶¶ 7,8.

The monitoring issue alone constitutes a significant material distinction between the present matter and the Napoleon Phase I construction underlying the *Holzenthal* litigation plaintiffs heavily rely on. When the 2010 Agreement and B&K's removal affidavit are read in conjunction, it is apparent that USACE and/or its' contractors assumed roles and responsibilities for the seven current Uptown projects that were attributed by the *Holzenthal* court to the SWB, including monitoring and approval of the daily construction activities.

Other significant differences between the current construction and the pre-*Holzenthal* construction include the superseding agreements between the USACE and CPRA, abrogating the 1997 Project Partnership Agreement between USACE and SWB, relied on heavily in that decision; that the USACE now directly contracts, controls, and supervises all vibration monitoring, and informs the contractors of any resulting issues; the USACE and/or its'

[9] *See* Rec. Doc. 1-8, pp. 2 and 9 of 14, noting that the USACE offered two alternative bid proposals for Jefferson Avenue Phase I.
[10] *See* Rec. Doc. 7-4, p. 3 of 8.

contractors are responsible for all project monitoring; and that the USACE directly hired design professionals for some of the phases. Upon information and belief, the plans and specifications for each of the seven current phases are not only different from Napoleon Phase I, but each other. That is, it is believed there are several significant differences in the construction means and methods, including a change in pile-driving equipment to use of a Giken hammer, a non-vibratory device, and that steel sheet-piles[11] will remain in place (instead of being removed), including along the length of Prytania Street, the project area closest to initial plaintiffs Fenner and Deussing. SWB proffers these details solely to rebut plaintiffs' spurious assertions that these seven projects are "exactly the same kind of drainage project" as Napoleon Phase I, which took place 15 years ago.

Contrary to plaintiff's contentions, the contractor-defendants and/or the USACE – *not* SWB - ultimately selected the construction methods each utilized on each phase. It should be uncontroverted that SWB did not drive any piles, create any vibrations, operate any cranes, drain or dewater any section of the project, perform construction acts, actions, or activities, supervise those acts, or change any traffic patterns. The acts plaintiffs complain of in their Petitions were entirely or almost entirely performed by the USACE and/or the contractor-defendants. SWB submits that given the reality of the construction the contractor-defendants could be considered required or indispensable parties to plaintiffs' petitions.

III. *HISTORY OF THE ORLEANS PARISH SELA LITIGATION*

Since plaintiffs' oft-cited 2004 *Holzenthal* decision, which dealt only with the claims over three homes, the property damage claims for hundreds of plaintiffs related to the construction of Napoleon Phase I were consolidated in federal court in the *Shimon v. Sewerage*

[11] Which are used to brace the excavation area. The "Construction Impact Zone" definition cited by plaintiffs from the 2010 Agreement is based on sheet-pile removal.

& Water Board litigation, which consolidated the claims of over 250 plaintiffs, pled in 60 different lawsuits, in front of Judge Lemelle.[12] By early 2008 the claims of over 220 plaintiffs had been settled and dismissed.

Multiple sections of this district court have repeatedly found a causal nexus between the actions of the USACE contractors on the SELA projects and the claims of the plaintiffs for property and other damages and denied numerous attempts at remand. In *Miles v. Sewerage & Water Bd. of New Orleans*,[13] one of the first SELA cases removed to federal court, the court denied a motion to remand in the exact same situation as the present, thereby establishing that it – and not state court – was the proper forum for the SELA litigation. In that matter SWB filed a near identical third-party demand against the USACE contractor, James Construction, who was not a defendant in plaintiffs' main demand and who removed the matter to federal court based on federal officer removal. *Miles*, No. 04-1587, Rec. Doc. 1. SWB was actually the party who moved to remand the matter to state court, challenging James' assertion of the government contractor defense. Judge Duval denied SWB's motion, finding a causal nexus between plaintiffs' claims against the SWB and the work that James performed for the USACE. *Miles v. Sewerage & Water Bd. of New Orleans*, 04-1587, 2004 WL 1794527, *3 (E.D.La. Aug. 10, 2004).

Contemporaneously, in *Fureigh v. Sewerage & Water Bd. of New Orleans* Judge Duval denied plaintiffs' Motion to Remand that had been filed immediately after removal, finding the same causal nexus between the plaintiffs' claims and James' work for the USACE. *Fureigh v. Sewerage & Water Bd. of New Orleans*, 04-1374, 2004 WL 1794524, *3 (E.D.La. Aug. 10, 2004).

[12] No. 05-1392, Rec. Doc. 1322 at 16.
[13] No. 04-1587.

Shortly thereafter, the dozens of property damage lawsuits out of Napoleon I and the initial Orleans SELA projects were consolidated for pre-trial purposes[14] in *Shimon v. Sewerage & Water Bd. of New Orleans* before Judge Lemelle, who later denied a Motion to Remand similar to the instant one. In addition to the arguments challenging the government contractor defense, plaintiffs there moved to sever the non-federal claims under 28 U.S.C. §1367, similarly arguing that the court should decline supplemental jurisdiction because the non-federal claims predominated over the federal claims. After first finding a causal nexus between plaintiffs' claims and the actions taken by the USACE contractor, the court also found that severance and remand would prove to be duplicative and a waste of judicial resources. *Shimon v. Sewerage & Water Bd. of New Orleans*, 05-1392, 2007 WL 4414709, *4,7 (E.D.La. Dec. 24, 2007).

In August 2012, the Dwyer Road phase of the SELA Project was made subject of a Class Action Petition in *Crutchfield v. SWB* that was later removed by the USACE contractor to this district court, where it is now pending.[15] Earlier this year, Judge Feldman denied the *Crutchfield* plaintiffs a motion to remand to state court, finding the third-party defendants had established a causal nexus between their actions and plaintiffs' claims. *Crutchfield v. Sewerage & Water Bd. of New Orleans*, 13-4801, 2015 WL 1781663, *2 (E.D.La. April 20, 2015).[16]

IV. HOLZENTHAL IS NOT CONTROLLING PRECEDENT, BUT DOES PROVE THAT PLAINTIFFS' AND SWB'S DEMANDS CAN BE TRIED USING THE SAME EVIDENCE

Although the issue of liability is premature and misplaced in plaintiffs' Motion, SWB is compelled to briefly address plaintiffs' heavy reliance on the *Holzenthal* decision and its'

[14] No. 05-1392, Rec. Doc. 92.
[15] But currently stayed while plaintiffs' have petitioned for appeal to the United States Fifth Circuit the issue of denial of that proposed class.
[16] That followed a denial by Judge Berrigan, who initially presided over the matter prior to recusal, of plaintiffs' Motion for Partial Summary Judgment on the merits of the government contractor defense that was intended to serve as a predicate to a remand. No. 13-4801, Rec. Doc. 307.

possible relevance to the present motion. As plaintiffs noted, the three plaintiffs' in *Holzenthal did not* sue the USACE contractor, but only SWB. SWB had also brought a near-identical third-party demand against the USACE contractor, James Construction[17], and a number of other parties. Yet, contrary to the contentions of the instant Motion to Sever, the *Holzenthal* court was able to rely on the same facts, witnesses, and evidence to decide plaintiffs' claims *and* SWB's Third Party Demand, including, as plaintiffs cite, the issue of whether "the contractors were to blame."[18] *If Holzenthal is instructive of anything relevant to plaintiffs' present motion, it is that the facts underlying plaintiffs' claims and SWB's Third Party Demand are nearly, if not completely, identical.*

As to the issue of whether *Holzenthal* is controlling precedent and establishes liability on the part of SWB as to all plaintiffs now or added later, that issue is neither ripe nor relevant to the severance issue, nor properly supported by any evidence to prove plaintiffs' assertions about the construction means and methodology and roles and responsibilities relative to each of the seven current Uptown construction projects at issue. Their arguments that there is "virtually no material distinction" between the facts of one phase (Napoleon I) undertaken 15 years earlier, and the seven current Uptown phases, are not evidence, and more importantly, as explained above, not true. While these arguments are not germane or material to the supplemental jurisdiction issue at the heart of plaintiffs' motion and do not merit a point by point rebuttal, SWB again submits that plaintiffs' motions and exhibits, plus the removal affidavit of B&K, highlight several of many key distinctions that will be proven over the course of this litigation.

It is not ripe or relevant to get into a specific primer on the construction methodology of each of the seven projects, but for plaintiffs' to prove that liability based on *Holzenthal* is a

[17] James did not attempt to remove *Holzenthal* based on 28 U.S.C. §1442(a)(1).
[18] Plaintiffs' irrelevant reference to SWB's expert Leonard Quick exemplifies this. The referenced testimony given by Mr. Quick regarding plaintiffs' claims was used to resolve the third-party contractor's defenses.

certainty, then that will require, at a minimum, review of the contracts, plans and specifications, construction acts, means, and methods, equipment used, etc. for *each* of the seven phases, with a corresponding comparison of each to the Napoleon I phase subject of *Holzenthal*. That alone proves the significant overlap between the federal and non-federal claims.

In order to prove their assertion that there is "virtually no distinction between the facts" of Napoleon Phase I and the present projects, they will need to prove the facts of each of the current seven projects. As plaintiffs' highlight with their selected excerpts from *Holzenthal*, the inquiry will necessarily hinge on the roles and responsibilities of SWB and the contractors, the monitoring data, and the construction methodology of each of the current seven phases.

The comparison of the parties' roles and responsibilities, most specifically that of the SWB, will require review of the USACE contracts to determine what was assigned to the contractors, what was specifically assumed by the USACE, including whether anything may had been assigned to the SWB. The USACE construction contracts and amendments thereto, plus the plans and specifications and submittals, for each phase will also have to be analyzed to determine the construction methodology and equipment utilized. And of course liability presupposes causation and damages, so a review of the daily construction reports will be necessary.

Thus, the attempted reliance on *Holzenthal* to establish liability on the SWB, as plaintiffs suggest, will require such an exhaustive, thorough review of the project related contracts and documentation, that *this review alone* confirms the factual and legal overlap between plaintiffs' state law claims and SWB's Third Party demands. In sum, plaintiffs own stated and intended course of litigation disproves their asserted bases for the requested severance

ARGUMENT

A. This Court has jurisdiction under Federal Officer Removal

SWB will defer a full review of the removal jurisdiction issue to the removing contractor, B&K, and the other contractor-defendants. Briefly, to establish the propriety of removal the contractor must: 1) demonstrate that it acted under the direction of a federal officer; 2) raise a colorable defense to the plaintiffs' claims; and 3) demonstrate a causal nexus between plaintiffs' claims and the acts performed under color of federal office. *Miles*, 2004 WL 1794527, *2. As shown earlier, this burden to establish federal officer removal and supplemental jurisdiction over plaintiffs' state claims has been repeatedly found and upheld throughout the SELA litigation, including in *Miles, Fureigh, Shimon*, and most recently in *Crutchfield.*

The instant matter presents a straightforward example of federal officer removal jurisdiction. It is undisputed that B&K and the other contractors are constructing the seven drainage culverts under contracts with the USACE. B&K's removal affidavit of Blake Andrews establishes that the USACE monitored B&K's work and approved the methods to perform that work. It is these construction acts, methods, and supervision that plaintiffs allege caused their damages. B&K contends that it complied with the project plan specifications provided by the USACE, and thus should be exonerated from liability under the government contractor defense (Rec. Doc. 1-7, p.3). It is thus apparent there is a causal nexus between B&K's government contractor defense and the claims of plaintiffs' petitions.

B. There is no basis for the Court to decline Supplemental Jurisdiction

Plaintiffs argue that this Court's exercise of supplemental jurisdiction under 28 U.S.C. §1367 over their state law claims is discretionary and should be declined. SWB respectfully disagrees, and asserts that *Holzenthal*, *Shimon*, and the SELA litigation prove the unassailable

factual and legal interrelatedness amongst the various claims, defenses, and third-party demands. Severing and remanding plaintiffs' claims would prejudice the SWB, subjecting it to dual-track litigation that is in no party's best interests, while retaining jurisdiction would streamline and make discovery easier and more efficient for all parties, particularly plaintiffs. There simply is no basis under §1367(c) as argued by plaintiffs to support the declination of supplemental jurisdiction.

The federal officer removal statute operates differently than the general removal statute given its broad language and unique purpose. *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL. No. 07-1873, 2012 WL 601805, *3 (E.D.La. Feb. 23, 2012). That purpose "is to protect the lawful activities of the federal government from undue state interference." *Willingham v. Morgan*, 395 U.S. 402, 406 (1969). The right to a federal forum for a federal officer "is not be frustrated by a grudgingly narrow interpretation." *In re FEMA Trailer Litig.* 2012 WL 601805 at *3, quoting *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998). One crucial distinction of the federal officer removal statute is there is *no* requirement that the federal court have original jurisdiction over the plaintiffs' claims. *Id.* quoting *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 809 F.Supp.2d 524 (E.D.La. 2011).

Further, none of plaintiffs' four cited §1367(c) exceptions apply here:

1. <u>There are no novel or complex issues of law</u>

Plaintiffs do not explain how or why Article 667 liability, inverse condemnation, and general negligence are novel or complex because they simply are not. Black's Law Dictionary defines novel as: "1. Usually refers to an idea or action that is considered to be unique and unusual." Plaintiffs' causes of action are not unique or unusual, but well established, well

defined, and straightforward areas of law that have been handled by federal courts innumerable times, including in the SELA context in *Shimon* and *Crutchfield*.

Inverse condemnation is heavily dependent on the facts of each plaintiff's case. As framed by the *Holzenthal* court: "the issue of whether a particular entity has taken property within the meaning of the Constitution is to be decided on the facts of the individual case. There simply is no bright line by which it can be determined that an entity did or did not cause an inverse condemnation of property." *Holzenthal v. Sewerage & Water Bd. of New Orleans*, 2006-0796 (La. App. 4 Cir. 1/10/07), 950 So. 2d 55, 66. This Court need only engage in a simple determination of the facts and apply the relevant, settled law to those facts. Plaintiffs' identify two leading Louisiana Supreme Court cases, *Constance* and *Avenal*, that cogently state that applicable Louisiana inverse condemnation law.

Article 667 liability has been routinely decided in this forum, including in the *Turner v. Murphy Oil*[19] oil-spill class litigation, and in oil-field legacy litigation[20] which required evaluation of multiple iterations of Article 667 over 50 years of allegedly offending activities. Negligence claims are handled so routinely in federal court as to not merit specific note.

In short, there is nothing novel, complex, or unsettled about plaintiffs' state law claims.

2. Plaintiffs' have not established the applicability of 28 U.S.C. §1367(c)(2) or that their state claims predominate over the federal issues

Plaintiffs' allege that the claims of their soon to be 126 plaintiffs substantially predominate over, and are distinct and foreign, to SWB's third-party demands against the contractor-defendants. Plaintiffs misstate their Petitions and mislead the Court when they state

[19] *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597 (E.D.La. Jan. 30, 2006)(Fallon, J.)(evaluating Articles 667, 2315, 2317 claims in the context of a proposed class action under Fed. R. Civ. Pro. 23).
[20] *Alford v. Chevron USA, Inc.*, 13 F. Supp.3d 581 (E.D.La. Jun. 4, 2014)(Vance, J.)(evaluating Articles 667, 2315, 2317, and numerous other state law claims, including trespass, continuing tort, etc.). If application of multiple versions of Article 667 over 50 years was not too complex, neither is only applying the current law.

their claims are "completely premised" upon the Louisiana Constitution "and are not based in tort"[21] - they clearly include numerous Article 667 and negligence claims against the SWB for construction acts, activities, and actions – acts which SWB did *not* perform, but were performed by the contractor-defendants.[22] *It is those construction acts and their effects, if any, which form the real body of this case.* Thus, the work of the government contractors, and the applicability of the government contractor defense, is at the center of the suit, and not a mere appendage. Plaintiffs' claims are inextricably intertwined with SWB's third-party claims.

First of all, plaintiffs have failed to show the applicability of § 1367(c)(2). This section was intended to accommodate abstention issues and should be invoked sparingly:

> The first two of these [provisions of § 1367(c)], that the claim that depends on supplemental jurisdiction "raises a novel or complex issue of State law" (Clause 1) or "substantially predominates over the claim or claims over which the district court has original jurisdiction" (Clause 2), *overlap the so-called case law-based "abstention" doctrines, under which a federal court can stay or dismiss a claim* ***with heavy state law elements****…The abstention doctrines are not lightly invoked* by the federal judges, and it is hoped that the setting forth of these analogous if not overlapping or duplicative bases in § 1367(c) will not encourage a looser application of them. *That may be especially true of Clause (2) of § 1367(c),* under which, for example, a state claim depending on supplemental jurisdiction may be found to predominate over the federal claim that supports the jurisdiction. Comment, *Discretionary Rejection of Supplemental Jurisdiction,* 28 U.S.C.A. § 1367 (West 2006)(emphasis added).

In addition to there not being any novel or complex state law issues, there are no heavy state law elements, including unresolved issues, split circuits, or issues of first impression, present.

Furthermore, § 1367(c)(2) does not apply when there is substantial overlap between the facts and issues of the respective claims. *McNerny v. Nebraska Public Power Dist.,* 309 F.

[21] *See* Rec. Doc. 7-1, pp.14-15.

[22] Plaintiffs' counsel has also indicated via correspondence that he is pursuing tortious interference with contract claims against SWB. *See* Letter from Michael Whitaker to Anthony Stewart and Craig Mitchell dated August 14, 2015, attached as Exhibit A. For the record and in response to the assertions therein, the residents were provided advance notice on three separate occasions by the USACE contractor.

Supp.2d 1109, 1118 (D. Neb. 2004); *Smith v. K-Mart Corp.*, 899 F. Supp. 503, 505-06 (E.D. Wash. 1995). The substantial factual and legal overlap is proven by the *Holzenthal* trial. In that matter, in order to determine causation and damages for those three plaintiffs, the liability of SWB, and the merits of SWB's near-identical third-party demands against the USACE contractor, James Construction[23], who had *not* been sued by plaintiffs, the trial court reviewed the daily construction and monitoring reports, including those related to groundwater and vibration levels, and the related USACE contract specifications for each. *Holzenthal*, 950 So.2d at 75-76. These daily reports and other evidence were used to resolve *both* plaintiffs' claims against SWB *and* SWB's third-party demand against the USACE contractor. The *Holzenthal* decision, which plaintiffs refer to numerous times as guidance and precedent, proves the substantial factual and legal overlap between plaintiffs' claims against the SWB, and SWB's third-party demands.

Plaintiffs argue the "potential" for damages from the seven construction projects, but regardless of that potential each plaintiff must still prove causation. They allege damage from dewatering, pile-driving, and other construction related activities; while SWB contends those actions were performed improperly by the contractor-defendants. Determining causation will necessarily entail a review of the daily construction reports evidencing those activities, plans and specifications between each contractor-defendant and the USACE, monitoring reports from those parties or their subcontractors and the like. If plaintiffs are to prove causation, they will do so by offering the project records and the contract specifications – the same nature of evidence used by the *Holzenthal* plaintiffs. If SWB is successful on its third-party demands against the contractor-defendants, it will do so by relying on the same reports to evidence the actions of the contractor-defendants. As *Holzenthal* has shown, there will be little to no difference in evidence proffered.

Restated, if plaintiffs were not damaged by the SELA project, their claims and SWB's claims will be resolved by the same fact-finding. However, and importantly, if SWB is correct in one or all of its' third-party demands, and a contractor-defendant did perform work improperly, certain plaintiffs will not have an inverse condemnation claim against SWB because their damage would not be the intentional or necessary consequence of the project. Once again, the fact finding serves to resolve both sets of claims.

Furthermore, B&K's establishment of the causal nexus between plaintiffs' claims and that of SWB's third-party demand, through its' affidavit of Blake Andrews, proves the factual and legal overlap. Plaintiffs willfully ignore the reality that the USACE contractors are performing the construction acts, activities, and actions which they claim is causing their property-damages, mental anguish, and lost rent and profits. By now multiple courts have found the causal nexus between plaintiffs' claims of this nature and the contractors' actions on SELA projects. This nexus proves the significant factual and legal overlap between plaintiffs' claims and SWB's third-party demands. *If there is a sufficient nexus to support removal, then there is significant overlap to preclude severance.*

Additionally, the contractor-defendants' government contractor defenses will not be determined by comparing as-built drawings. Again, the issue is the means, methods, and acts and activities undertaken to get to the built underground culvert. Plaintiffs misconstrue the government contractor defense and nature of SWB's third-party demands. SWB is not suing over deviations in locations of infrastructure, so there is no need for it to consult as-built drawings.

In sum, the evidence necessary to prove damages from construction related acts, actions, and activities significantly overlaps that to prove SWB's third-party demands, particularly where those acts, activities, and actions were performed *not* by SWB, but by the USACE contractors.

Finally, plaintiffs' reliance on *Crocker v. Borden, Inc.*[24] is inapposite due to the presence of a myriad of defendants who were not federal contractors. In *Crocker* over 3,000 plaintiffs asserted state law claims against numerous defendants arising out of asbestos exposure at the Avondale Shipyard. On the eve of trial in a state court action the primary defendant, Owens-Corning Fiberglass ("OCF"), filed a third-party demand against Westinghouse alleging that some of plaintiffs' damages were the result of exposure to asbestos contained in marine turbines manufactured by Westinghouse, who then removed the action based on the government contractor defense.

The federal district court upheld that removal based on federal officer removal. However, it severed OCF's third-party demand against Westinghouse and remanded the remaining claims, finding that the state law claims predominated because they were a small part of the approximately 3,000 asbestos claims in which Westinghouse was *not* a defendant, and that the third-party demand on the eve of trial came too late and would prejudice the state court plaintiffs. *See Crocker*, 852 F. Supp. at 1331.

None of those factors is present here. 71 plaintiffs have been included to date in the present suit, *every one* of which is claiming damages from a SELA phase conducted by a federal contractor to the USACE. The government contractor defense is being or will be asserted against *every* plaintiff. Given Westinghouse's implication in only a small percentage of 3,000 cases it could be argued there that state claims predominated. Plaintiffs could try their claims against OCF without implicating any facts or issues involving Westinghouse. Here, *not one* plaintiff can try their case without implicating facts and issues regarding the performance of the construction by one of the four federal contractors.

[24] 852 F. Supp. 1322 (E.D.La. 1994).

In conclusion, while SWB does not believe 28 U.S.C. 1367(c)(2) was intended to apply here because there are none of the traditional reasons present for the Court to abstain from making state law determinations, and there is an obvious significant overlap between the non-federal and federal law claims. Nowhere is this more evident than the very case plaintiffs repeatedly point this court toward and cite as precedent - *Holzenthal*. In an almost identical scenario, where the SWB was the only defendant and the USACE contractor present via SWB's near-identical third-party demand, the court used the same project records, documents, witnesses, and experts to decide both plaintiffs' claims and SWB's third-party claims. Even though there are numerous changes from the Napoleon Phase I SELA construction to the present seven phases in construction means and methodology, roles and responsibilities, governing contracts, and the like, the same types of evidence will be relied on herein.

3. Compelling reasons of fairness, prejudice, and judicial economy favor retaining federal jurisdiction

This factor militates against severance because of the duplicative litigation and potential prejudice that could result. This would result in dual-track litigation with plaintiffs litigating and offering evidence in support of their damage claims in state court, using facts and evidence relating to the construction activities, while SWB litigate its' claims against the contractor-defendants in federal court relying on the same facts and evidence and legal issues. The likelihood of conflicting interpretations of the same evidence from the different forums would be great and potentially prejudice and harm SWB. Plaintiffs fail to offer any precedence or support for this proposal.

SWB vehemently denies plaintiffs' repeated assertions that its third-party demands are merely attempts to delay the litigation. This incendiary and insulting argument is nonsense, patently false, and a red herring. Plaintiffs made the choice to file one lawsuit aggregating claims

arising out of seven separate construction projects. There will soon be over 120 plaintiffs and that number is expected to rise higher.[25] Each one of these plaintiffs has the independent burden of providing evidence to prove causation and damages. The sheer size and scope of the litigation is due entirely to choices the plaintiffs have made. Regardless, SWB is confident that, if necessary, the Court can devise a means of addressing the third-party issues while keeping plaintiffs' underlying damage claims on track.

Discovery will actually be substantially easier for plaintiffs if this matter is not severed. The contractors and the USACE were responsible for monitoring the projects and preparing the daily reports while SWB had no oversight or reporting requirements. Without the contractor-defendants being in the same suit the plaintiffs would find it more difficult to obtain the documents relied on by the *Holzenthal* plaintiffs to prove causation, particularly the daily contractor reports and the daily USACE quality assurance reports, and other reports, including from vibration monitoring. None of the contractors, or the USACE, has a contract with the SWB, and no obligation to provide those documents to the SWB. Plaintiffs need the contractor-defendants in the same suit to prove their many claims against SWB.

Finally, potential confusion by a jury is not a concern as the claims against SWB cannot be tried to a jury.

C. Without any reason to decline supplemental jurisdiction, there is no basis to sever

As has been shown regarding the significant factual and legal overlap, plaintiffs' damage claims and SWB's third-party demands emanate from the same transactions and occurrences – the construction activities, actions, and acts of each of the seven phases of the Uptown SELA project. Causation, damages, and liability are not novel or complex issues and are common

[25] *See* Notice of Neighborhood Meeting for August 19, 2015 to discuss claims against the SWB for property damage, emotional distress, loss of business revenue, and attorneys' fees, attached as Exhibit B.

across the demands. The witnesses and documents, the contracts plans and specifications, daily reports, and the like will be the same. Plaintiffs artfully avoid identifying what documents they believe they need to prove causation and liability so as to make it appear the evidence will be distinct, but that simply is not the case. There is no support for severance.

CONCLUSION

There is no basis for declining supplemental jurisdiction and severing plaintiffs' state law property damage claims. Causation of and liability for those damages is the crux of both plaintiffs' suits and SWB's Third Party Demand. The significant and factual overlap between them has been proven by prior litigation and is highlighted by the wide array of allegations made by plaintiffs for construction activities performed *not* by SWB, but by four different contractors hired and supervised by the USACE. The appropriateness of the federal forum to decide plaintiffs' claims has been repeatedly upheld. It will provide a superior and more expedient forum for the plaintiffs, will streamline and simplify discovery, and prevent the potential prejudice that could result from dual-track litigation. Plaintiffs' Motion to Sever and Remand must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of September, 2015 a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all known counsel of record by operation of the court's electronic filing system.

/s/ *Christopher D. Wilson*