

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE: WELDING ROD PRODUCTS :
LIABILITY LITIGATION : **Case No. 1:03-CV-17000**
: **(MDL Docket No. 1535)**
:
: **JUDGE O'MALLEY**
:
: **MEMORANDUM AND ORDER**
:

This Court has earlier issued two opinions resolving motions to remand filed in cases transferred to this Multi-District Litigation. See docket no. 101 (“First Remand Order”); docket no. 224 (“Second Remand Order”) (In re Welding Rod Products Liab. Litig., 2004 WL 1179454 (N.D. Ohio May 21, 2004)); see also docket no. 148 (denying a motion to reconsider the First Remand Order). In its First Remand Order, the Court resolved certain procedural issues, having mostly to do with the time requirements set out in 28 U.S.C. §§1446 & 1447. In its Second Remand Order, the Court examined two jurisdictional arguments: whether the military contractor defense provided a valid basis for removal, and also whether the joinder of non-diverse defendants was fraudulent under Mississippi law.

These two Orders resolved directly only a relatively small number of cases, but the parties agreed to apply the Court’s reasoning to other, similar cases, where possible, and stipulate to removal or remand. See docket no. 229 (Court’s Order directing the parties to address the effect of its earlier Remand Orders

on other MDL cases);¹ docket nos. 277, 358 (Court’s adoption of the parties’ joint stipulated order “regarding [the] effect of the Court’s [Second Remand Order] on additional cases in the MDL proceeding”). The parties also agreed to identify those MDL cases in which plaintiffs had filed remand motions raising jurisdictional issues the Court did not address in the earlier Remand Orders.

In docket no. 374, the parties identified Roberts v. Lincoln Electric Co., case no. 04-CV-17331, as one of the cases where a motion to remand remained unresolved. Roberts “involves a fraudulent joinder argument under Arkansas law.” Stipulation at 1. The parties further note that the Court’s jurisdictional ruling in Roberts may determine whether defendants seek to remove many other, similar cases that are (or will soon be) filed in Arkansas state court.

The Court thus enters this Third Remand Order addressing the motion to remand filed in Roberts (case no. 04-CV-17331, docket no. 2). For the reasons stated below, the Court finds well-taken the defendants’ argument that the non-diverse defendants were fraudulently joined. Accordingly, the motion to remand is **DENIED**. The Court will later issue additional Orders attending to remand motions pending in other cases.

¹ With the Order at docket no. 229, the Court directed the parties to “submit, subject to the parties’ right to object to the Court’s rulings: (1) a document listing all other cases where remand motions have been filed, identifying: (a) those cases the parties agree are subject to remand under the Court’s order; (b) those cases the parties agree are properly within this Court’s federal jurisdiction, and not subject to remand under the Court’s order; and (c) those cases that require additional attention from the Court, because the Court’s Order does not resolve the propriety of remand; and (2) a proposed stipulated Order granting or denying those remand motions where the parties are in agreement (that is, categories 1a and 1b).” Order at 1. In addition, the parties agreed to act in accord with the Court’s Remand Orders in other, related cases (e.g., the defendants agreed not to file notices of removal in cases where the Court made clear that federal jurisdiction was lacking, and the plaintiffs agreed not to file motions to remand in cases where the Court made clear that federal jurisdiction was present).

I.

In Roberts, the plaintiff is a resident of Arkansas, while the named defendants are residents of various states, including Arkansas.² In particular, plaintiff Harold Roberts has named as defendants El Dorado Welding & Industrial Supplies (“El Dorado”) and Welsco, Inc. (“Welsco”), both of which are corporate citizens of Arkansas. Given that Roberts shares the same state of residency with these two defendants, diversity of citizenship is apparently not complete; the face of the complaint suggests this Court cannot exercise diversity jurisdiction. Nevertheless, the diverse defendants filed a notice of removal, asserting that removal was proper because the Arkansas defendants “have been fraudulently joined as defendants to defeat removal jurisdiction.” Notice of removal at ¶4. Specifically, the removing defendants explain that

the Arkansas defendants did not design, manufacture or sell welding consumables that caused or contributed to plaintiff’s alleged injuries. Additionally, the Arkansas defendants did not know and had no reason to know at any relevant time of the alleged dangers associated with manganese-containing welding consumables as alleged by the plaintiff.

Id. The removing defendants thus conclude that “the plaintiff has no possibility of recovery against the Arkansas defendants under Arkansas law, and the citizenship of the Arkansas defendants should be disregarded for diversity purposes.” Id.

In the Second Remand Order, the Court set out the legal standards applicable to an analysis of fraudulent joinder. Order at 4-6. For the sake of easy reference, the Court repeats those standards here, in their entirety. In the next subsection of this Opinion, the Court applies those standards to the

² The Court refers to “plaintiff” instead of “plaintiffs” for ease of reference, even though both Mr. Roberts and his wife are named plaintiffs.

circumstances of the Roberts case.

A. Legal Standards

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

testimony for evidence of fraud or the possibility that the plaintiff can state a claim under state law against a nondiverse defendant.” Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 311 (5th Cir. 2002); see Ohio Nat’l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990) (a court may examine evidence of its power to hear a case, and must “weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist”).

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

The removing party bears the burden of demonstrating fraudulent joinder, Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 330 (6th Cir. 1989), and removal statutes must be strictly construed, Wilson v. U.S. Dept. of Agriculture, 584 F.2d 137, 142 (6th Cir. 1978). Thus, the “burden of persuasion placed upon those who cry ‘fraudulent joinder’ is indeed a heavy one.” Fields v. Reichenberg, 643 F. Supp. 777, 779 (N.D. Ill. 1986); see id. (“In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state

court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts") (emphasis in original). The plaintiff's motive in joining a non-diverse defendant "is immaterial to [the] determination regarding fraudulent joinder." Jerome-Duncan, 176 F.3d at 907; see also Harris v. Great Lakes Steel Corp., 752 F. Supp. 244, 246 n.4 (E.D. Mich. 1990) ("[t]he proper inquiry is whether there is any reasonable basis for asserting a claim against a defendant, not whether the plaintiff's motive in joining a defendant is to destroy diversity"). Similarly, whether the plaintiffs will ultimately recover against the removing defendants is also immaterial. See Great Northern Ry. Co. v. Alexander, 246 U.S. 276, 282 (1918) ("whether such a case non-removable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits . . . order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses"). The Court must resolve "all disputed questions of fact and ambiguities in the controlling . . . state law in favor of the non-removing party." Coyne, 183 F.3d at 493; see also Hartley v. CSX Transp., Inc., 187 F.3d 422, 425 (4th Cir. 1999) ("The best way to advance th[e] objective [of minimizing threshold litigation over jurisdiction] is to accept the parties joined on the face of the complaint unless joinder is clearly improper. To permit extensive litigation of the merits of a case while determining jurisdiction thwarts the purpose of jurisdictional rules.").

B. Analysis.

The complaint in Roberts lists 25 different defendants, not including "John Doe" defendants. See complaint at ¶3 (listing all defendants). Of these 25 entities, Roberts alleges that "All of the Defendants are or were manufacturers, sellers, suppliers, or large industrial consumers of welding products." Id. at ¶14

(emphasis added). At least as to two defendants, however, this sweeping allegation is incorrect: Roberts names as defendants Metropolitan Life Insurance Company (“MetLife”) and also the National Electric Manufacturers Association (“NEMA”), neither of which, itself, ever actually manufactured, sold, supplied, distributed, or consumed welding products. Rather, as the plaintiffs have explained in other documents and hearings before the Court, these two defendants have close relationships with welding rod manufacturers and suppliers and are named because they allegedly played a role in a conspiracy to conceal the dangers of using welding rods.³ Roberts’ continued use of the generic term “Defendants” in his complaint, then, introduces a certain degree of vagueness regarding which defendants are alleged to have done what. It is not true, as the MDL plaintiffs have argued, that their use of the term “defendants” in their complaints is always all-inclusive, and always refers to every named defendant.

Roberts’ complaint contains four counts: (1) conspiracy to fraudulently conceal the dangers of welding rods; (2) negligent failure to exercise reasonable care to ensure plaintiff’s safety; (3) negligent failure

³ Roberts acknowledges that NEMA and MetLife were not actually manufacturers, sellers, suppliers, or consumers of welding products when, elsewhere in the complaint, he more accurately describes these entities. See complaint at ¶16 (“NEMA is a trade organization comprised of manufacturers”); id. at ¶¶25, 41 (alleging MetLife conspired with other defendants in its role as a member of NEMA’s Welding Section); see also plaintiff’s renewed motion to remand at 2 n.1 (“NEMA is a trade association of manufacturers that has a section for manufacturers of welding products” and “[MetLife] is an insurer that is alleged to have participated in the conspiracy to conceal the harmful effects of manganese exposure”).

to warn plaintiff of known hazards; and (4) strict product liability.⁴ In his motion to remand, Roberts argues he has stated a colorable claim against both Welsco and El Dorado under each of the four counts. Defendants, however, parse the allegations of Roberts' complaint and assert that: (1) he has not sufficiently alleged the required elements of each claim against the two Arkansas defendants; and/or (2) he has not responded meaningfully to evidence submitted by defendants showing that he does not have a colorable basis for recovery against the Arkansas defendants. Having examined the allegations pertaining to each of Roberts' four claims, the Court agrees.

1. Strict Product Liability Claim.

The defendants begin by examining Roberts' claim for strict product liability. As all parties agree, to recover under a strict product liability theory under Arkansas law, the plaintiff must prove the following elements: (1) the defendant is engaged in the business of manufacturing, assembling, selling, leasing, or otherwise distributing a product; (2) the product was supplied by the defendant in a defective condition that rendered it unreasonably dangerous; and (3) the defective condition was a proximate cause of harm to the plaintiff. See Hill v. Central Arkansas Equip. & Supply, Inc., 2002 WL 242524 (Ark. Ct. App. Feb. 20, 2002) (citing Ark. Code Ann. §4-86-102(a) (Repl. 1996); E.I. Du Pont de Nemours & Co. v. Dillaha,

⁴ Roberts also asserts a "fifth claim" for punitive damages, but this claim is more in the nature of a prayer for relief and not an independent cause of action. See 22 Am. Jur.2d Damages §551 (2nd ed. 2004) ("[A]s a rule, there is no cause of action for punitive damages by itself; a punitive-damages claim is not a separate or independent cause of action. Rather, a punitive-damages award is an element of recovery, a type of relief, or an additional remedy. * * * They have been described as parasitic, in the sense that they cannot be awarded until a plaintiff proves an underlying cause of action.") (footnotes omitted).

280 Ark. 477, 659 S.W.2d 756 (1983)). The Arkansas defendants highlight the second prong and assert that, not only has Roberts failed to rebut their evidence that they did not supply to him any welding rod product at issue, Roberts has not even alleged they supplied him with any such product at issue. Somewhat surprisingly, Roberts does not respond directly to these assertions, even though defendants have made them twice.⁵

Regarding the issue of the sufficiency of Roberts' strict product liability allegations, defendants note that – unlike the general allegations contained elsewhere in the complaint – Roberts defines with some particularity which defendants actually supplied the welding rod products at issue. Roberts alleges that “Lincoln, ESAB, Select Arc, Hobart, Illinois Tool Works, Airco, Praxair, Teledyne, Deloro Stellite, Sandvik, Westinghouse, Eutectic, Miller Electric, J.W. Harris, [and] Airgas (collectively the ‘seller Defendants’), during some or all of relevant times, manufactured, sold, or distributed welding products that were supplied to Plaintiff’s work sites.” Complaint at ¶¶80, 90. Notably, Roberts does not allege that Arkansas defendants Welsco and El Dorado are “seller Defendants.” Thus, when Roberts alleges he “was exposed to welding fumes containing manganese from products sold by the seller Defendants,” id. at ¶91 (emphasis added), he has not alleged that “the product was supplied by [an Arkansas] defendant in a defective condition,” as required under the second element of his product liability claim. In other words, defendants argue (and have done so in two different rounds of briefing) that Roberts has not even alleged Welsco or El Dorado supplied him with any welding product at issue. Defendants conclude that, because

⁵ Defendants first raised these arguments in their brief in opposition to the motion to remand, which they filed in Arkansas federal court, before the case was transferred to this MDL Court. The defendants then raised the same points again in their renewed brief in opposition, which they filed with this Court after the case was transferred.

Roberts “has not alleged that the defective products to which he was exposed were manufactured, sold, or distributed by either El Dorado or Welsco, but instead expressly alleges that the defective products to which he was exposed were manufactured, sold, or distributed by the ‘seller Defendants,’ there is no possibility that [he] can recover on a strict liability claim against the non-diverse defendants.” Supplemental opposition brief at 6-7 (footnote omitted).

Roberts does not respond to this argument with, for example, a motion to amend his complaint, nor does he suggest in his briefs that he inaccurately defined the term “seller Defendants” and meant to include Welsco and El Dorado. Indeed, Roberts does not even argue explicitly that his use of the all-inclusive term “defendants” in other allegations in his complaint somehow rescues his failure to include the Arkansas defendants as “seller Defendants.” Rather, Roberts merely recites the Arkansas statutory definition of “seller” and “product,” and asserts that “[i]t is not disputed that both Welsco and El Dorado are suppliers of products within the meaning of Ark. Code Ann. §16-116-102.” Renewed motion at 6. This assertion, however, misses the point. The reason the defendants have not “disputed” that Welsco and El Dorado are suppliers of welding rod products is that Roberts never alleged they were suppliers of product in the first place – and certainly never alleged Welsco or El Dorado supplied the particular products that harmed Roberts. Indeed, Welsco and El Dorado are each mentioned only once in the complaint – in the second paragraph, which lists the citizenship of each defendant – and are most conspicuous in their absence from the list of seller Defendants.

Further, El Dorado tendered an affidavit averring that, purely as a matter of fact, and as confirmed by its internal account-number assignment system, it never sold, supplied, or distributed any welding

products to Roberts or the facility where he was employed.⁶ Roberts chose not to file a reply brief to the defendants’ renewed opposition, leaving this jurisdictional evidence un rebutted. As to El Dorado, then, the only jurisdictional evidence of record weighs in favor of a finding of fraudulent joinder. As to Welsco, the record on whether it supplied Roberts or his employer with any welding rod product is silent, leaving “only” Roberts’ failure to allege that Welsco actually supplied him with one or more of the products at issue.

If the Court were, *sua sponte*, conducting its own jurisdictional review of Roberts’ removed complaint, without the benefit of two rounds of briefing, the Court might overlook or ignore Roberts’ failure to include Welsco and El Dorado as “seller Defendants” and simply assume Roberts meant to include the in-state distributors as suppliers of the allegedly defective products at issue. But defendants have repeatedly pointed out this failure and Roberts has not once given a direct, on-point response. At best, Roberts notes that, throughout his complaint generally, he alleges that “the Defendants” undertook certain acts, and the umbrella term “the Defendants” includes Welsco and El Dorado. This response fails for two reasons. First, Roberts’ particularized definition of “seller Defendants” necessarily trumps the generic term “Defendants.” Second, as noted, Roberts uses the term “Defendants” in ways that clearly do not include each and every defendant. See complaint at ¶14 (“All of the Defendants are or were manufacturers, sellers, suppliers, or large industrial consumers of welding products”) (emphasis added); id. at ¶17 (“The Defendants created committees within these trade organizations”). Put simply, Roberts has not alleged a necessary element of a strict product liability claim under Arkansas law against El Dorado or Welsco. Thus, Roberts does not present a colorable strict product liability claim against a non-diverse defendant.

⁶ The Court assumes the reference by affiant El Dorado manager Charles Caple to “Georgia Pacific Corporation in Crossett, Arkansas” is a reference to Roberts’ employer.

2. Negligence Claims.

Roberts asserts two negligence claims against the defendants: negligent failure to exercise reasonable care to ensure plaintiff's safety; and negligent failure to warn plaintiff of known hazards. The same pleading deficiency that scuttles Roberts' product liability claim also scuttles these two negligence claims. In his negligent sale of product claim, Roberts carefully notes that "the seller Defendants had the duty, as product sellers, to exercise reasonable care for the safety of the Plaintiff." Complaint at ¶82 (emphasis added). This duty included the obligations of "investigating . . . the health hazards" of using the products, "writing and publishing adequate and timely precautionary product labels," and "writing and publishing adequate and timely specifications and standards about ventilation, safety equipment, and other precautionary measures." *Id.* at ¶83. Roberts then alleges that "[t]he Defendants breached their duty of reasonable care to the Plaintiff and were negligent . . ." *Id.* at ¶85. It is not clear whether Roberts' use of the term "Defendants" in ¶85 is purposefully different from his use of the term "seller Defendants" in ¶82, or is generically imprecise. But the only "Defendants" whom Roberts alleges owed him a duty are the "seller Defendants," so only the "seller Defendants" could have breached that duty. As noted, the seller Defendants explicitly do not include Welsco or El Dorado. Absent allegations against Welsco or El Dorado that they owed him a duty to exercise reasonable care and breached that duty, Roberts has not stated a valid negligence claim based on sale of the product against a non-diverse defendant.

The same reasoning applies to Roberts' negligence claim based on failure to warn. With this claim, Roberts alleges that "all Defendants had a legal duty to exercise reasonable care for the safety of the Plaintiff when making representations about welding safety and health in warning labels, publications, and instructions for ventilation and other precautionary measures." Complaint at ¶72 (emphasis added). As

defendants point out, however, in Arkansas, the duty to warn about the dangers of using a product is owed by manufacturers and sellers of that product. See West v. Searle & Co., 806 S.W.2d 608, 613 (Ark. 1991) (“[a]s a general rule, a manufacturer has a duty to warn the ultimate user of the risks of its product”) (emphasis added). Defendants assert that “[t]here is no basis for finding that a merchant has a duty to warn a *non-customer* of alleged product defects.” Supplemental brief in opp. at 10 (emphasis in original). While this assertion may not be entirely true in all circumstances, it is true that Roberts’ has not supplied any factual allegation supporting the conclusory assertion that El Dorado or Welsco, in particular, owed him a duty to warn. Nowhere in the complaint does Roberts allege that El Dorado or Welsco manufactured, sold, or distributed the welding products that produced the fumes causing his alleged neurological injury. Without this link, Roberts has not stated a valid negligence claim based on failure to warn against a non-diverse defendant.

3. Conspiracy.

This leaves only Roberts’ claim that the defendants conspired to fraudulently conceal known dangers of using welding rod products. The question of whether Roberts’ conspiracy claim against El Dorado and Welsco has sufficient color to defeat diversity jurisdiction is somewhat closer than with the other claims. The Court concludes, however, that even the conspiracy claim against these two defendants is fraudulently joined.

The heart of Roberts’ conspiracy claim is contained in the following allegations:

63. At all relevant times, the Defendants, with knowledge of the health hazards of manganese in welding fumes[,] acted in concert and conspired in pursuance of a common plan or design to commit the following tortious acts:

- a. fraudulently conceal, misrepresent, and suppress material scientific and medical information about the toxic effects of manganese in welding fumes;
- b. deliberately fail to warn persons in proximity of welding fumes of the known health hazards of manganese in welding fumes;
- c. deliberately breach their duty to instruct about proper ventilation, safety equipment, or other precautionary measures which would protect against the health hazards of manganese in the welding process;
- d. deliberately breach their duty to investigate the health hazards of manganese welding; [and]
- e. sell welding products in a defective condition without necessary warnings of the catastrophic health hazards or instructions concerning precautionary measures.

64. The Defendants knowingly agreed to participate in the conspiracy by one or more of the following means:

- a. actively taking part;
- b. furthering it by cooperation; or
- c. ratifying and adopting acts of other conspirators done for their benefit.

Complaint at ¶¶63, 64. Roberts further alleges that the principal mechanism of the defendants' alleged concealment was to control certain committees of NEMA and the American Welding Society, which were responsible for studying the effects of welding fume exposure and disseminating product safety information.

Id. at ¶¶16-19 et seq.

To establish a civil conspiracy, Roberts must allege and show five elements: “(1) two or more persons; (2) come to a meeting of the minds; (3) on an object to be accomplished or a course of action to be followed; (4) and one or more overt unlawful acts are performed; (5) with damages as the proximate

result thereof.” Loughridge v. Goodyear Tire and Rubber Co., 192 F.Supp.2d 1175, 1186 (D. Colo. 2002); In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 113 F.3d 1484, 1488-89 (8th Cir. 1997); Faulkner v. Arkansas Children's Hosp., 69 S.W.3d 393, 406 (Ark. 2002). To establish the fraudulent concealment that the defendants allegedly conspired to achieve, Roberts must allege and show: “(1) concealment of a material existing fact that in equity and good conscience should be disclosed; (2) knowledge on the part of the party against whom the claim is asserted that such a fact is being concealed; (3) ignorance of that fact on the part of the one from whom the fact is concealed; (4) the intention that the concealment be acted upon; and (5) action on the concealment resulting in damages.” Loughridge, 192 F.Supp.2d at 1184.

Here, Welsco and El Dorado insist they never took any action in furtherance of any conspiracy to conceal the danger of welding rods and, in fact, never had any knowledge that inhalation of welding rod fumes could cause neurological injury. To back up this assertion, the two defendants offer affidavit evidence swearing to their lack of knowledge. Managers for both defendants aver that, before being served with Roberts’ complaint, the only information they had suggesting welding fumes were dangerous was contained in the Material Data Safety Sheets that accompanied the welding products. El Dorado’s affidavit adds that “[n]either El Dorado nor any of its owners or managers was ever a member of NEMA or its Electric Welding Section or Arc Welding Section, nor of the American Welding Society [“AWS”] or its committees.” Caple affid. at 1. Similarly, Welsco “has never been a member of [NEMA]” and, although it is a member of AWS, “none of its employees have ever been members of any of the committees” that Roberts refers to in his complaint. Harrison affid. at ¶4.

Roberts responds that, with these averments, Welsco and El Dorado are attacking the viability of

his conspiracy claim on the merits, which is not the appropriate inquiry when examining fraudulent joinder. Roberts argues that “whether Welsco and El Dorado knew or had reason to know at any relevant time of the dangers associated with welding products containing manganese is a question for a jury to resolve.” Renewed motion at 8. Roberts is certainly correct that it is immaterial to the Court’s fraudulent joinder analysis whether he will ultimately recover against the two in-state defendants. But it is also true that, in the face of jurisdictional evidence supporting fraudulent joinder, “generic allegations of wrongdoing on the part of the non-diverse defendant[s] are not sufficient to show that the defendant was not fraudulently joined.” Sago v. Wal-Mart Stores, Inc., 280 F.Supp.2d 578, 583 (S.D. Miss. 2003) (citing Badon v. RJR Nabisco, Inc., 224 F.3d 382, 392-93 (5th Cir. 2000)).

As noted above, removing defendants are allowed to present evidence to prove that the plaintiff does not have a colorable basis for recovery against the non-diverse defendants; this Court can then employ a summary judgment-like procedure that allows it to pierce the pleadings and examine affidavits and deposition testimony to determine whether diversity is complete. Great Plains Trust Co., 313 F.3d at 311. “When conducting a fraudulent joinder analysis, a court must resolve all disputed questions of fact and ambiguities of law in favor of the non-removing party, but *only* when there exists an actual controversy, i.e. when *both* parties have submitted *evidence* of contradictory facts.” Sago, 280 F. Supp.2d at 583 (quoting Badon, 224 F.3d at 394) (emphasis in original, citation omitted). “A court should not, ‘in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts’ to support his claims against the non-diverse defendant.” Id. Put differently, if a removing party presents evidence that establishes a claim of fraudulent joinder, “the Court has no authority to grant a motion to remand based on the possibility that future discovery may reveal a factual basis to dispute the

unchallenged evidence of record.” DaCosta v. Novartis AG, 180 F.Supp.2d 1178, 1183 (D. Or. 2001); see also TPS Utilicom Services, Inc. v. AT&T Corp., 223 F.Supp.2d 1089, 1102 (C.D. Cal. 2002) (“Whether or not a plaintiff may recover on the stated claims against the resident defendants does not include consideration of whether, with further discovery, the plaintiff may uncover a factual basis for its claims – rather, the deference given to the plaintiff in a fraudulent joinder analysis means that the court refrains from delving into the merits of defenses that do not present a procedural bar to the action.”). This remains true even though ferreting out discovery supportive of a conspiracy claim, in particular, is notoriously difficult. See Weberg v. Franks, 229 F.3d 514, 528 (6th Cir. 2000) (“[r]arely in a conspiracy case will there be direct evidence of an express agreement among all the conspirators to conspire,” which is why “circumstantial evidence may provide adequate proof of conspiracy”).

In this case, the only allegations tying Welsco and El Dorado to the alleged conspiracy are wholly generic. Roberts simply asserts the two Arkansas corporations are both part of the group of 25 “defendants” that conspired to fraudulently conceal the dangers of welding rods. Absent any evidentiary challenge, this allegation might be sufficient. But defendants have countered Roberts’ generic allegations, asserting that, as a simple factual matter, Welsco and El Dorado had no connection to the alleged conspiracy and no undisclosed knowledge that welding rod fumes were hazardous. This challenge is supported not only by defendants’ unanswered affidavit evidence, but also by the fact that Roberts has not even alleged Welsco or El Dorado supplied him with the products that allegedly injured him. Thus, the defendants have carried their burden of production by offering evidence tending to show there is no color to Roberts’ conspiracy claim against them. To avoid a finding of fraudulent joinder, Roberts must adduce some threshold evidence contradicting defendants’ position and tending to show there is color to his

conspiracy claim. He cannot merely rely on his generic allegations, even if those allegations are sufficient as to other defendants. But that is what Roberts has chosen to do. Accordingly, Roberts has not stated a valid conspiracy claim against a non-diverse defendant.⁷

C. Conclusion.

Given that Roberts has not stated any colorable claims against a non-diverse defendant, the removal of this case by defendants was proper and the motion for remand must be denied.⁸ In cases where the plaintiffs have made either no or only generic allegations against specific defendants, who later adduce unrebutted evidence that they have no connection to the plaintiff nor to other appropriately-named defendants, joinder is “clearly improper.” On the other hand, if the plaintiff makes specific allegations tying a specific defendant to a plaintiff or to a conspiracy among co-defendants, or if a plaintiff can adduce

⁷ The Court further notes that, as it did in the Second Remand Order, the Court compared the circumstances presented in this MDL case to those presented in other mass tort cases finding fraudulent joinder. See Second Remand Order at 10-12. Although Roberts alleges generically that the in-state defendants were “in the know” – that is, they were a part of the conspiracy to conceal information, as opposed to being a part of the broader public from which the information was concealed – Roberts makes “no allegations specifically against the [Arkansas defendants], but instead lump[s] them together with the manufacturers and attribute[s] the acts alleged . . . to the ‘defendants’ generally.” In re Rezulin Products Liab. Litig., 133 F.Supp.2d 272, 291 (S.D.N.Y. 2001) (finding fraudulent joinder). In contrast, the plaintiffs in the Mississippi Welding Rod cases “presented evidence” giving color to their fraudulent concealment claim. Second Remand Order at 6; see id. at 10 (“the plaintiffs provide a non-frivolous depiction of evidence and inferences to support their claim that Nordan Smith did have reason to know” that “welding fumes could cause neurological injury”). On balance, the current state of evidence and allegations in Roberts’ case is more akin to Rezulin than to the Mississippi Welding Rod cases discussed in the Second Remand Order.

⁸ The Court’s finding of fraudulent joinder, of course, does not imply any “intent to deceive” on the part of plaintiffs or their counsel. DaCosta, 180 F.Supp.2d at 1181.

evidence giving color to his claims against a particular defendant, then joinder of that defendant is clearly proper. This case falls into the former category. The Court's future analyses of other remand motions will employ this framework.

IT IS SO ORDERED.

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

DATED: January 12, 2005