

Filed
10/14/09

NO. 62996-4-I
(Consolidated)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHAEL FARROW and LIDIA FARROW,

Appellants/Plaintiffs,

v.

LESLIE CONTROLS, INC., et al.

and

ALFA LAVAL, INC., et al.

Respondents/Defendants.

Consolidated Appeal from the Superior Court of Washington
for King County
(Cause No. 08-2-07177-4 SEA)

REPLY BRIEF OF APPELLANTS

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I. DEFENDANTS' BRIEFS IMPROPERLY ASK THIS COURT TO WEIGH EVIDENCE AND TO CHOOSE PORTIONS OF THE EVIDENCE LESS FAVORABLE TO THE FARROWS OVER THOSE PORTIONS THAT ARE MORE FAVORABLE TO THE FARROWS' POSITION

The summary judgment record includes the complaint signed only by William Rutzick (L-CP 5-10) as well as the Rutzick Declaration which explained that the disclaimer in the complaint was limited:

By making such a limited disclaimer, I was intending to reduce (although not eliminate) the likelihood of a successful removal to federal court, while guarding against the possibility that the disclaimer would swallow the plaintiffs' claims if a court determined that naval vessels docked in a federal enclave were part of a federal enclave.

L-CP 179-180 (emphasis added).

The record also includes a memorandum by Mr. Barrow of Simons, Edison and Greenstone ("SEG") in the prior case of Abbey v. Cla-Val Co., et al., explaining the Abbey's position that the disclaimer does not include asbestos exposures that took place aboard navy ships, even if those ships were in a federal enclave.¹ Furthermore, at L-CP 1262

¹ Mr. Barrow stated:

Plaintiffs willingly concede that they disclaimed any recovery for exposures to asbestos that took place on land shown to be a federal enclave. But by its own terms, the disclaimer does not include exposures that took place aboard navy ships: "Plaintiffs hereby disclaim any cause of action or recovery for any injuries by any exposure to asbestos dust that occurred in a federal enclave, which expressly excludes U.S. Navy vessels." (Comp., p. 6, emphasis added.) It follows that even if ITT establishes that Puget Sound Naval Shipyard is a federal enclave, the disclaimer does not apply to any exposures that took place aboard ship.

L-CP 1426-1427 (emphasis added).

the record includes Mark Tuvim's² oral argument in Abbay where he acknowledged that plaintiffs' argument was that the phrase "which does not include U.S. Naval vessels" actually "modifies the word disclaim as opposed to [the words] federal enclave." (Emphasis added.)³

A. The Above Evidence Refutes Many Of Defendants' Arguments.

It is a fundamental principle that this Court, in reviewing de novo this summary judgment, should view "all facts and reasonable inferences" in the "light most favorable to" the Farrows who were the non-moving parties. Owen v. Burlington N. Santa Fe R.R., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005); Ross v. Kirner, 162 Wn.2d 493, 500, 172 P.3d 701 (2007).⁴ Defendants' arguments repeatedly violate this fundamental principle.

² Mr. Tuvim signed the brief of Leslie Controls and ITT Corporation ("Leslie Brief") in the present appeal, which was joined by all defendants. All of the defendants also joined the Garlock, et al. Brief ("Garlock Brief") and the Crane Co. Brief.

³ Defendants Garlock and Crane Co. also cite the opinions in Holdren v. Buffalo Pumps, Inc., 614 F. Supp. 2d 129 (D. Mass 2009) and Oberstar v. CBS Corp., 2008 U.S. Dist. Lexis. 14023 (C.D. Cal. 2008). They are cited not as legal authority, but as evidence that "plaintiffs California counsel has, in other jurisdictions, used the same disclaimers and has characterized it as a method by which to exclude any federal claims that could lead to removal." Crane Brief, p. 8; Garlock Brief, pp. 9, 10, 15. Neither these opinions nor any documents relating to those opinions were presented to the trial court. If this Court considers this additional evidence, plaintiffs ask that Brian Barrow's declaration in Abbay in connection with the Abbay's motion for reconsideration (attached hereto as Appendix A) be considered as well on this same issue. See Tegland Wash. Practice Vol. 5 EVIDENCE LAW AND PRACTICE, Fifth Edition, §103.14, p. 78. The record already includes the court's order denying the requested reconsideration. L-CP 1357-1359.

⁴ Leslie at page 11 of their brief under the heading "Summary Judgment Standard" argues that "the trial court's factual findings supported by substantial evidence should not be disturbed. See, e.g., Leer v. Whatcom County Boundary Review Bd., 91 Wn. App. 117,

1. Defendants argue that the Farrows “readily admit” that their disclaimer language “was an effort to avoid the potential for successful removal to federal court.” Leslie Brief, p. 6. See also Garlock Brief, p. 18; Crane Co.’s Brief, p. 14 (same). The Rutzick Declaration provides facts disputing (and thus refuting for summary judgment purposes) those arguments when it says “[b]y making such a limited disclaimer, I was intending to reduce (although not eliminate) the likelihood of a successful removal to federal court.” “Reduce” (which means to “bring down” or decrease) is not the same as “avoid” (which means to keep from happening). See AMERICAN HERITAGE COLLEGE DICTIONARY (3rd Ed.), pp. 1145 and 95.

Garlock similarly argues that:

(“[i]n an effort to avoid removal, Michael and Lydia Farrow drafted a disclaimer that voluntarily forfeited their right to pursue claims for injuries arising out of any alleged exposures to asbestos within a federal enclave. After similarly situated plaintiffs’ claims were dismissed by other Judges on the King County Superior Court, the Farrows reversed course.”)

Garlock Brief, p. 1 (emphasis added). The Rutzick declaration also refutes that argument by providing substantial evidence that plaintiffs’

126, 957 P.3d 251 (1998).” Leer was not a summary judgment case, and summary judgments are reviewed de novo on appeal with no deference paid to finding of fact. See Tegland, Wash. Proc., Vol. 4, Rules Practice, p. 393 (“[f]indings of fact and conclusions of law are unnecessary upon the granting or denial of summary judgment CR 52(a)(5). If findings are entered, they will be disregarded by an appellate court.”).

interpretation of the disclosure was not a last minute “reverse of course”, but was understood that way by the Farrows’ Washington counsel since he signed the complaint.

2. Defendants also argue that plaintiffs “substituted this new, diametrically opposed interpretation of the waiver than had been offered by these same law firms on behalf of the plaintiffs in Abbay.” Leslie Brief, p. 8 n. 3 (emphasis added).⁵ The portion of SEG’s brief in Abbay quoted supra at n. 1 refutes that argument because it there argues that “the disclaimer does not apply to any exposures that take place aboard ship”. See State Farm v. Trecik, 117 Wn. App. 402, 407-08, 71 P.3d 703 (2003), Sun Mountain v. Pierre, 84 Wn. App. 608, 618, 929 P.2d 494 (1997).

Nor can defendants successfully argue that, prior to argument in Farrow, they were unaware of plaintiffs’ interpretation. To the contrary, Mr. Tuvim acknowledged in Abbay that it was plaintiffs’ position that the phrase “which does not include U.S. Naval Vessels”⁶ “modifies the word disclaimer as opposed to [the words] Federal enclave.” That is very close

⁵ See also Id. at page 23 (“[i]t was not until Judge Heller ruled against the plaintiffs in Abbay in July and August of 2008 that the proffered interpretation of the waiver changed though the terms, punctuation, and syntax used had not.”), Garlock Brief, p. 13 (“[o]nly in the face of dismissal, and armed with the knowledge of how other judges on the King County Superior Court interpreted identical language and dismissed the cases, did the Farrows reverse course and attempt to explain away the disclaimer.”)

⁶ The disclaimer phrase actually was the substantively identical phrase “which expressly excludes U.S. Naval Vessels.” CP L-CP-9.

to plaintiffs' argument in this case. It is also true that Mr. Tuvim in Abbey argued against that interpretation on grammatical grounds. He argued to Judge Heller that "which":

[I]s a pronoun or an adjective and, you knew going back to fourth and fifth grades, pronoun and adjectives have to modify nouns not verbs and disclaim in that sentence is being used as a verb as opposed to a noun.

L-CP 1262. However, Garlock and Crane (joined by all other defendants, including Leslie) refute that argument when they cite this Court to MERRIAM-WEBSTER'S ONLINE DICTIONARY at www.merriam-website.com/dictionary/which. See Garlock Brief, p. 14. Crane Brief, p. 12. That on-line dictionary states that "which" is:

[U]sed by speakers on all educational levels and by many reputable writers, though disapproved by some grammarians, in reference to an idea expressed by a word or group of words that is not necessarily a noun or noun phrase, he resigned that post, after *which* he engaged in ranching > *Current Biography*. (Emphasis added.)

Appendix B hereto. See also AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Third Edition), L-CP 228, 1163 whose "Usage Note" for "which" provides that the antecedent of "which" need not be a noun or noun phrase but may "be a sentence or clause." The "Usage Note" also points out that such usage may lead to exactly the kind of ambiguity that exists in this case.

II. PLAINTIFFS DID NOT DISCLAIM CAUSES OF ACTION BASED UPON ASBESTOS EXPOSURE UPON U.S. NAVY SHIPS DOCKED OR MOORED AT A FEDERAL ENCLAVE

A. Plaintiffs' Interpretation Of The Clause Beginning With "Which" Is Both Grammatical And Logical.

Judge Heller's original order in Abbey recognized that plaintiffs' disclaimer was ambiguous because it was subject to two reasonable alternative interpretations. L-CP 1216. Plaintiffs' interpretation was one of those two reasonable interpretations, i.e., the phrase "which expressly excludes U.S. Naval vessels" could logically modify the entire disclaimer, i.e., "disclaims any cause of action or recover for any injuries caused by exposure to asbestos dust that occurred in a federal enclave."

Plaintiffs explained in their opening brief at page 14 "that the phrase ' , which expressly excludes U.S. Naval vessels,' qualifies the entire disclaimer." At page 19 they explained that, using Judge Heller's language, they "intended" to "disclaim all causes of action that arose in a federal enclave except those that arose onboard a docked ship."

Defendants acknowledge that this is plaintiffs' position:

The Farrows argue that the last clause of the disclaimer "which expressly excludes U.S. Navy Vessels," qualifies and refers to the phrase "disclaim any cause of action or recovery for any injuries caused by exposure to asbestos that occurred in a federal enclave. .. Consequently, they allege that the disclaimer was meant to waive all causes of

action except those arising from work that Mr. Farrow performed on U.S. Navy vessels.

Garlock Brief, p. 12 (emphasis added).

Garlock and thus all other defendants make several arguments against this construction, but none are persuasive. Garlock argues that:

Although the Farrowes provide examples where “which” was used to qualify the antecedent phrase, as they argue on appeal, this does not change the prevalent usage of the word “which”:” to qualify the immediately antecedent noun. See Merriam-Webster’s Online Dictionary at www.merriam-webster.com/dictionary/which.

Garlock Brief, p. 14. However, as noted above, that same online dictionary refutes that argument because it indicates that “though disapproved by some grammarians, “which” is used by “many reputable writers” in reference to an idea expressed by “a group of words that is not necessarily a noun or noun phrase.” Since the usage of “which” to refer to an idea expressed by a group of words not a noun or noun phrase is also “prevalent”, there is no good basis for concluding that plaintiffs did not intend that usage. To the contrary, that is exactly what plaintiffs did intend according to the Rutzick Declaration.

Garlock also argues that Judge Heller in his reconsideration order concluded that “the only logical, grammatically appropriate reading is the one proposed by the defendants.” Id. at 14. However, that is not what Judge Heller actually wrote at L-CP 1358. In his reconsideration, he did

not reject his earlier analysis that the disclaimer logically could mean either of the two alternatives set out in his original order. Instead, he concluded that “the basic rules of grammar” requires that the term “which” modifies the immediately antecedent noun “federal enclave” as opposed to the distinct verb “disclaim”. However, as discussed in plaintiffs’ original brief and as confirmed by the dictionary quoted above, it is common (although disapproved by some grammarians) to use “which” to “reference a group of words that is not necessarily a noun or noun phrase.”

Leslie joined in Garlock’s Brief (Leslie Brief, p. 2), and thus joined in Garlock’s interpretation of plaintiffs’ argument quoted, supra, at p. 7. At the same time, Leslie’s Brief asserts (citing page 17 of plaintiffs’ opening brief, but ignoring the Rutzick Declaration as well as pages 13 and 19 of plaintiffs’ opening brief as well as Garlock’s interpretation of the same language), that plaintiffs’ interpretation of the language is that “causes of action ... expressly exclude U.S. Navy Vessels.” Leslie Brief, p. 15. Based on that assertion, Leslie argues that plaintiffs’ interpretation is:

Illogical, and makes no grammatical or semantic sense. Naval vessel themselves (rather than the claims arising from exposure on them) cannot be excluded from causes of action, yet that is what appellants claim the language in

their California and Washington Complaints was intended to do. Id.

Leslie is wrong because, as Garlock correctly put it at page 12 of its brief, plaintiffs' interpretation is that the clause beginning with "which" qualifies the words "disclaim any cause of action or recovery caused by exposure to asbestos that occurred in a federal enclave ..." As Leslie acknowledges, "claims arising from exposure on [Naval Vessels] may be excluded from causes of action." Leslie Brief, p. 15. That is just what the disclaimer in the complaint did since the definition of "disclaimer" is "to deny or relinquish all claim to". WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED (Second Edition - Deluxe Color), p. 520. Thus, there is nothing illogical or contrary to semantics about plaintiffs' interpretation. Nor is plaintiffs' argument dependent on the interpretation by California counsel of their California complaint. Given that the disclaimer could reasonably be interpreted two ways as plaintiffs explained in their opening brief, the fact, if true, that one attorney interpreted it the first way does not mean that another attorney cannot have interpreted it the second way.

Defendants other arguments fare no better. There was no need for plaintiffs to move to amend their complaint once they realized that it was ambiguous, because Washington law permits clarification to be made in

response to summary judgments. State v. Adams, 107 Wn.2d 611, 620, 732 P.2d 149 (1987). Secondly, contrary to Leslie's argument at pages 16-17 of its brief, the disclaimer relating to the "federal contractor defense" has very different elements than the federal enclave issue so there would be no necessary reason to include the limitation "which does not include U.S. Naval vessels" in the disclaimer relating to the federal contractor defense. Thirdly, Leslie provides a selective quote at pages 18-19 of its brief of a portion of the response to summary judgment in Abbey. Leslie does not include the portion of that same response which largely agrees with plaintiffs' position in this appeal and which was quoted supra at pages 1-2, n. 1. See L-CP 1426-1427.⁷

B. Plaintiffs' Complaint Is Not A Contract, Should Be Construed Liberally, And May Be Clarified At Summary Judgment.

Garlock at page 16 of its brief argues that "[i]t is a basic legal principle that any ambiguity is construed against the drafter. Foss v. Golden Rule Bakery, 184 Wash. 265, 51 P.2d 405 (1935)." Leslie makes

⁷ Plaintiffs also explained to the trial court and in their opening brief that language in legal documents should not be interpreted to be superfluous or insignificant, citing UPS v. Dept. of Revenue, 102 Wn.2d 355, 361-62, 687 P.2d 186 (1984). Defendants' and the trial court's interpretation of the disclaimer make it superfluous or insignificant. Opening Brief, p. 29. Defendants only response is that SEG made such an argument in other cases. Garlock Brief, pp. 14-15. This argument is both factually and legally flawed. Factually, SEG had interpreted the disclaimer in language in Abbey similarly to plaintiffs in this case. See, n. 1, supra. Legally, asserting a legal principle in a complaint does not make the legal principle more true and is thus superfluous no matter how many times it is done.

the same argument, citing the same case, at page 23 of its brief. Both defendants, however, are relying on an inapposite case since Foss was referring to the interpretation of contracts, not pleadings.

Plaintiffs' complaint was not a contract; rather it was a pleading whose interpretation is controlled by CR 8. The Washington Supreme Court in State v. Adams, 107 Wn.2d at 620, interpreted CR 8(a) with respect to pleadings such as plaintiffs' complaint. The Adams court held at page 620 both that pleadings were to be "liberally construed" and that pleadings which "may" be unclear, may be clarified during the course of summary judgment proceedings":

It is well established that pleadings are to be liberally construed; their purpose is to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process. . . . Furthermore, initial pleadings which may be unclear may be clarified during the course of summary judgment proceedings.

Thus, what plaintiffs did in this case is directly supported by Adams. Defendants argue that the ambiguity was different in Adams, than in this case because the Adams court suggested "that the defendants had received notice of the requested relief. Id. at 620." Crane Brief, p. 16. However, the language in Adams was broad and there is no indication in Adams that it was limited to the specific facts in that case. Moreover, the way

defendants in Adams received notice was in the summary judgment briefing. Id. at 620. That is exactly what happened in this case.

C. Limiting The Likelihood Of Federal Court Jurisdiction Does Not Constitute Improper Forum Shopping.

Garlock also argues that the Farrow's interpretation of their complaint should be "discredited" as a "blatant attempt" at forum shopping. See Garlock Brief, p. 19. That argument is wrong. No less an authority than the United States Supreme Court has repeatedly held that it is proper for a litigant to draft a complaint that will limit or avoid federal jurisdiction:

The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's well-pleaded complaint."

Caterpillar, Inc. v. Williams, 482 U.S. 386, 392-93 (1987) (*citing* Gully v. First Nat'l Bank, 299 U.S. 109, 112-13, (1936)).⁸ The only other case cited by defendant is In re Marriage of Verbin, 92 Wn.2d 171, 184, 595 P.2d

⁸ Garlock also quotes a portion of Jones v. Gen. Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir. 1976) (Garlock Brief, p. 19). However, Garlock omits the preceding paragraph which states in relevant part:

[T]he plaintiff has the prerogative of determining the theory of his action and, so long as fraud is not involved, he may defeat removal to the federal courts by avoiding allegations which provide a basis for the assertion of federal jurisdiction.

Id. at 664.

905 (1979). That case had nothing to do with a plaintiff's right to limit federal jurisdiction.⁹

III. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED BASED ON PSNS BEING A FEDERAL ENCLAVE WITHIN THE MEANING OF PLAINTIFFS' COMPLAINT AND WHICH SUPPORTED FEDERAL QUESTION JURISDICTION OF THIS ACTION

A. Defendants Consistently Misread Federal Enclave Law.

Plaintiffs' primary argument on this issue is that since (a) Washington has concurrent jurisdiction of those portions of Puget Sound Naval Shipyard ("PSNS") to which title was acquired by the U.S. after 1939, (b) such concurrent jurisdiction includes all jurisdiction not inconsistent with PSNS operating as a Naval repair yard, and (c) there is

⁹ Nor was there anything intentional or unfair about the complaint in this case. The complaint was not intended to be ambiguous. See L-CP 179-180. Under federal law which plaintiffs cited at page 26 of their original brief, if a complaint is ambiguous so that it does not provide a basis for removal, removal can take place after that basis is discovered. See Peters v. Lincoln Electric, 285 F.3d 456, 465-66 (6th Cir. 2007). Moreover, this case could have been removed by defendants in August 2008 if defendants, in fact, had originally misinterpreted plaintiffs' disclaimer, since this case had been filed for less than a year. 28 USC §1446.

Without any evidence in the record, Leslie argues at page 6 of its brief, that:

Based on the language of this waiver, and given the apparent lack of diversity jurisdiction, Leslie and ITT did not consider any effort to remove this matter to federal court.

The problem with coming up with such unsworn statements of fact that were not made to the trial court is that plaintiffs had no opportunity in the trial court to provide contrary evidence. For example, plaintiffs are unaware of either Leslie or ITT ever removing a Washington state court case alleging asbestos disease arising out of PSNS exposure either before or since Farrow. Had this argument been made in the trial court, plaintiffs would have supplied evidence to that effect.

no shown inconsistency between PSNS operating as a Naval Shipyard and the use of Washington tort law in this case, Washington tort law does not become federal law so there is no “federal question” jurisdiction. There was thus no basis for removal of this case based on “federal enclave” status of PSNS. It therefore does not make sense to conclude that PSNS is a federal enclave for purposes of the complaint since plaintiffs would have no reason to do so. Defendants never produce a satisfactory response to that argument.

1. Defendants Misread The Requirements To Be A “Federal Enclave”.

Defendants argue that:

Any “places” that the federal government acquired from a state either through purchase or eminent domain under this Clause becomes a “federal enclave.” *Paul v. United States*, 371 U.S. 245 (1963); *id.* at 263-67; *see also United States v. Johnson*, 994 F.2d 980, 984 (2d cir. 1993).

* * *

Here, as the trial court found, the federal government has taken, and the State of Washington agreed to, the cession of both the land and tide lands that comprise PSNS. *See, e.g.*, RCW 37.04.010, RCW 37.08.180, Wash. Const. Art. XXV, § 1 (Presidential Proclamation).

Garlock Brief, pp. 22-23. That analysis has the virtue of simplicity, but the vice of being almost completely wrong. First, Paul, at pp. 263-67 did not hold that simply because the federal government acquired a “place”,

that “place” becomes a “federal enclave.” Paul, at 264, instead, holds that there are other requirements including the state’s consent, i.e.:

[B]ut without the state’s “consent” the United States does not obtain the benefits of Art. I, § 8, Clause 17, its possession being simply that of an ordinary proprietor. James v. Dravo Contracting Co., 307 U.S. 134, 141, 142

....

Moreover, “a state may condition its “consent” upon its retention of jurisdiction over the land consistent with the federal use.” Id. at 265.¹⁰

Secondly, neither the Washington Constitutional provision nor the statutes cited by defendants demonstrate that Washington ceded exclusive sovereignty of PSNS to the federal government. Art. XXV, § 1 of the Washington Constitution has nothing to do with this issue because it was adopted in 1889 and it only relates to “such tracts or parcels of land as are now held or reserved by the government of the United States” No part of PSNS was held or reserved by the United States as of 1889.¹¹ RCW 37.04.010 is the first of five sections under Chapter 37.04 entitled,

¹⁰ A further requirement for enclave status is formal acceptance by the federal government, pursuant to 40 USC 255 (now 40 USC 3112). As held in U.S. v. Johnson, 994 F.2d 980, 984 (2nd Cir. 1993):

Section 255 thus requires a department or agency to follow a series of steps in order to acquire jurisdiction over a particular piece of state land: (1) the agency must acquire ownership of the parcel; (2) it must secure from the state consent to such jurisdiction; and (3) it must indicate acceptance by either (a) formal acceptance to the governor of the state or (b) by complying with the relevant state law requirements. *Id.* (Emphasis added.)

¹¹ RCW 37.08.180 simply refers to RCW 37.16.180, which covers title to land donated to the United States “from any county”. Again, that has nothing to do with PSNS which had no land donated by any county.

General Cessions of Jurisdiction. While 37.040.010 gives consent to acquisition of land by the United States, the remaining sections, particularly RCW 37.040.020-.030, make clear that what is being ceded is “concurrent jurisdiction,” and that:

[T]he state of Washington hereby expressly reserves such jurisdiction and authority over land acquired or to be acquired by the United States as aforesaid as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition. (Emphasis added.)

2. Defendants Misread Mater v. Holley And Cases Following It.

Garlock also argues:

Claims which arise in a federal enclave are removable to federal court. *Mater v. Holley*, 200 F.2d 123 (5th Cir. 1952).

Id. at 22. Similarly, Leslie argues that the question before the Court:

is not whether the substantive law applicable to Appellants’ tort claims is federal or state, or even whether a federal or state court is the sole available or appropriate form for Appellants’ complaint. Rather, the question here is simply whether PSNS is a military shipyard over which the federal government possesses through express or implied acceptance the jurisdiction necessary to administer it as a military base – the parameters of Appellants’ voluntary waiver of claims in this action from asbestos exposures in a federal enclave. (Footnote omitted)

Leslie Brief, pp. 41-42. Both of these arguments misread Mater v. Holley, 200 F.2d 123 (5th Cir. 1952) and the many cases following Mater.

Mater sets forth an analysis that justifies federal jurisdiction in a personal injury action between private parties only when there is exclusive “federal sovereignty” over the enclave. Mater explained that, for purposes of Art. 1, § 8, Clause 17 of the U.S. Constitution, the reference to “exclusive legislation” “has been construed to mean exclusive ‘jurisdiction’ in the sense of exclusive sovereignty. 200 F.2d at 123.¹² As correctly explained in Plaintiffs’ Opening Brief at pages 37-38:

Mater held that when the federal government had exclusive jurisdiction over an enclave (which were the facts in Mater, federal question jurisdiction pursuant to 28 USCA. § 1331 applies because the state law that existed previously ceases to exist and becomes “federal law” . . .

(Emphasis added.) In Mater, the only reason there was federal jurisdiction under § 1331 which requires a “federal question” was because the pre-existing state law was turned into federal law, given the federal government’s exclusive sovereignty. In this case as to all land title to

¹² Defendants also argue that “it is simply inconsequential whether jurisdiction over PSNS is concurrent ... rather than exclusive.” Garlock Brief, pp. 31-32, relying on the statements at pages 123 and 125 of Mater. Garlock is confusing the concepts of concurrent court jurisdiction and concurrent sovereignty. Transitory actions, such as personal injury claims, may be brought in a state that has personal jurisdiction over the parties even though the substantive law of another state or of the United States applies. For example, Mendoza v. Neudorfer Engineers, Inc., 145 Wn. App. 146, 152, 185 P.3d 1204 (2008) quotes Gulf-Offshore v. Mobile Oil Corp., 453 U.S. 473, 481 (1981) stating that “[s]tate courts routinely exercise subject matter jurisdiction over civil cases arising from events in other states and governed by the other state’s laws.” As Mendoza correctly held, federal claims may be heard in Washington Courts. However, state claims involving private parties may not be heard in federal courts, which are courts of limited jurisdiction, unless there is federal jurisdiction.

which was acquired after 1939, there is no exclusive federal sovereignty since the sovereignty called for by state law and accepted by the federal law was concurrent. As such, Washington tort law does not become federal law so there is no “federal question” jurisdiction under § 1331. That was precisely the holding of Pratt v. Kelly, 585 F.2d 692, 696 (4th Cir. 1978) and Sylvane v. Whalen, 506 F.Supp. 1355, 1361 (E.D. N.Y. 1981) which plaintiffs quoted at pp. 38-39 of their opening brief. No defendant distinguished or even cited either of those cases. See also, Stokes v. Adair, 265 F.2d 661, 665-66 (4th Cir. 1958); McComber v. Bose, 401 F.2d 545, 546 (9th Cir. 1968); Akin v. Asland Chemical Co., 156 F.3d 1030, 1034 n. 1 (10th Cir. 1998); and Fung v. Abex Corp., 816 F. Supp. 569, 571 (N.D. Cal. 1992), all of which cite and rely on the analysis in Mater discussed above.¹³ Thus, contrary to Garlock’s position not all claims arising in a federal enclave are removable. Contrary to Leslie’s position, a “federal enclave” for federal question removal purposes relating to state court tort actions between private parties such as Mater, Pratt, and Sylvane exists only when the state law is turned into federal law. That did not happen here.

¹³ Neither plaintiffs nor defendants have cited any U.S. Supreme Court holding on the issue of the need for exclusive jurisdiction in order to turn state law into federal law and thus permit removal based on federal question jurisdiction. Mater, Pratt, Stokes, Akin, and McComber, as Court of Appeals cases, thus represent the controlling authority on this issue.

B. The Undefined Term “Federal Enclave” In Plaintiffs’ Complaint Should Be Given Its Dictionary Definition, Or, At A Minimum, Defined In Accordance With Its Conceded Purpose To Reduce Or Avoid The Risk Of Removal To Federal Court.

Plaintiffs’ disclaimer in their complaint referred to but did not define “federal enclave.” This Court must therefore determine whether PSNS is a “federal enclave” as that term was used in the complaint. Only if the answer to that question is yes, could the disclaimer language apply to PSNS.

Washington law holds that undefined terms should be given their dictionary definitions and, if a legal term, should be defined in accordance with a legal dictionary such as BLACK’S LEGAL DICTIONARY. See State v. Alvarado, 164 Wn. 2d 556, 562, 192 P.3d 345 (2008), Mut. of Enumclaw v. U.S. Ins. Co., 164 Wn. 2d 411, 423, 197 P.3d 866 (2008).¹⁴ Plaintiffs cited both BLACK’S LEGAL DICTIONARY and four federal cases, including U.S. v. Mississippi Tax Com., 412 U.S. 363 (1973) and Swords v. Kemp, 423 F. Supp. 2d 1031, 1034 (N.D. Cal. 2005) holding that “federal enclaves” were under the exclusive jurisdiction of the United States.

Leslie’s first response to those authorities is that BLACK’S LEGAL DICTIONARY’s definition is “simplistic” and plaintiffs’ position is inconsistent with precedent. Leslie Brief, p. 41. The first argument

¹⁴ No defendant responded to this argument, which was contained at p. 34 of plaintiffs’ original brief, presumably because they could not dispute it.

misses the point of using a dictionary which is to ascertain a simple and well-understood (rather than an obscure or idiosyncratic) definition. Calling a definition “simplistic” is a negative way of saying it is simple. Nor did defendants cite a contrary dictionary definition. The argument that the definition is inconsistent with the precedent is refuted by the cases plaintiffs cited, including U.S. v. Mississippi Tax Com. Similarly, Leslie’s effort at page 41 to distinguish Mississippi Tax Com. from this case fails when it argues:

[T]he federal government never asserted in [U.S. v. Mississippi Tax Com.] that the state’s liability to tax alcohol transported onto military bases affected the federal military use and purpose of the bases.

It is equally true, however, that the federal government has never asserted that the use of Washington tort laws to recover for asbestos related injuries from PSNS asbestos exposure 30 years ago affects “the federal military use and purpose of the bases.”¹⁵

¹⁵ Defendants cite a number of cases, including James v. Dravo, 302 U.S. 134 (1937), and L&I v. Dirt & Aggregate, Inc., 120 Wn.2d 49, 53, 837 P.2d 1018 (1992), supporting the position that a federal enclave does not always require exclusive jurisdiction. Leslie Brief, p. 41. However, that begs the question here which is whether a tort in an enclave automatically give rise to federal jurisdiction which would justify removal. That was not at issue in any of the cases cited by Leslie. Moreover, the tort in Pratt took place in a federal enclave but there was no federal jurisdiction for the tort, given Virginia’s concurrent jurisdiction. Finally, Dirt & Aggregate, Inc. also holds that “[t]he scope of federal jurisdiction over an area is governed by the terms of the cession agreement.” Id. In that case involving Rainier National Park, the jurisdiction of the U.S. was exclusive except for Washington’s right to serve process. That is much less jurisdiction than Washington reserved for acquisitions after 1939 which provided

Secondly, defendants argue throughout their briefs that plaintiffs only purpose for using the disclaimer language in the complaint was to “avoid” removal. See text and footnotes, infra, at p. 3. Plaintiffs’ contrary evidence was that the disclaimer language was to reduce the risk of removal to federal court. L-CP 179-80. Thus, both sides agree that the only purpose of the disclaimer related to “reducing” or “avoiding” such removal. An action may only be removed to federal court if the action would support federal jurisdiction. See 28 USC § 1446. It therefore would make no sense to interpret federal enclave as that term is used in the complaint as places where asbestos exposure and resulting disease would not support federal jurisdiction and thus removal to federal court. As discussed, supra at pages 16-18, a tort action against private companies based on asbestos exposure at PSNS does not permit federal question jurisdiction based upon enclave status given RCW 37.04.020-030 and such Court of Appeals cases as Mater, Stokes, and Pratt.

C. There Are Material Disputed Facts As To When The U.S. Acquired Title Of Record To (And Whether It Ever Accepted Jurisdiction Of) The Approximately 440 Acres Of Submerged Land At PSNS Where The Piers And Dry Docks Are Built.

Plaintiffs’ opening brief discussed the 440 acres of submerged land, title to which was first acquired in 1951 and the evidence that the

Washington with jurisdiction over all matters that do not interfere with the purposes of the acquisition.

U.S. did not accept jurisdiction for that or any land after 1945. Brief of Appellants, pp. 8-9, 43-45. Defendants submitted to the Trial Court the June 23, 2008 Declaration of Karen Booth which stated in relevant part:

A major portion of the property comprising the Puget Sound Naval Shipyard and consisting of approximately 440 acres of submerged lands extending into Sinclair Inlet was transferred to the United States Government by the State of Washington and title to said property was confirmed in the name of the United States Government by a Judgment on Declaration of Taking entered February 19, 1951,

L-CP 1174 (emphasis added); see also L-CP 58, 354 and 1136. This evidence causes defendants three serious problems.

1. First, since title to the 440 acres was recorded after the 1939 effective date of RCW 37.04.010-030, the federal government's jurisdiction is only "concurrent" and Washington "expressly reserves such jurisdiction and authority" over such land as "is not inconsistent with" the U.S.'s jurisdiction and authority. The consequence is that since Washington reserves jurisdiction over those 440 acres, Washington tort law relating to asbestos exposures on that property "is not inconsistent with" federal jurisdiction and therefore does not become federalized. Thus, there is no federal jurisdiction for such torts pursuant to 28 USC § 1331; Pratt, Sylvane v. Whalen, 506 F.Supp. at 1361; and Mater.¹⁶

¹⁶ This is particularly true in this case because there is no inconsistency between Washington tort law relating to recovery of workers from manufacturers of asbestos-

2. Defendants' second problem is that, as they acknowledge, the "440 acres of submerged land" were the lands "from and into which the shipyards' piers and dry docks extended. See L-CP 354, 1136, 1173". Leslie Brief, p. 34. Defendants also concede that most of Mr. Farrow's asbestos exposure was aboard ships located on piers or dry docks. See excerpts from Farrow Dep. quoted at n. 11 to the Leslie Brief, and n. 10 to the Garlock Brief. As such, the first Booth Declaration and the other above-cited evidence, eliminates defendants' arguments that (a) "the portions of PSNS where Mr. Farrow worked were within the land, title to which was obtained by the federal government pre-1939 and for which the U.S. had exclusive jurisdiction, or that (b) given the evidence in the summary judgment record, plaintiffs failed to meet their burden to show evidence to that effect. See Leslie Brief, p. 38.¹⁷

3. The U.S. government's 1945 acceptance of "concurrent jurisdiction" was only for "lands title of record to which has been acquired for military purposes ...". L-CP 1140. Since title of record to the 440

containing products and the Navy's purposes in building and repairing ships at PSNS. There is no evidence that the Navy or the U.S. government has ever expressed such a concern in the 30 years that scores or hundreds of PSNS cases have been filed and completed in King County. Secondly, the federal workers' compensation program (OWCP), which provides benefits to civilian PSNS workers for asbestos-related diseases, is subrogated to portions of the state law recovery, so OWCP benefits from such recoveries. 5 USC § 8132.

¹⁷ The fact that defendants rather than plaintiffs provided the evidence is immaterial; the important thing is that the evidence is in the record. See WPI 1.02 Civil, 5th Ed.

acres according to Ms. Booth's declaration and the other evidence was not acquired until, at least, 1951, the 1945 letter by its terms does not apply to the 440 acres and the federal government thus did not accept jurisdiction pursuant to § 3112. This undercuts defendants' argument that because PSNS had utilized some of that land before 1945, the 1945 letter must apply to that land. See Leslie Brief, pp. 32-33, 36, including n. 12.

Federal law provides that:

Even when the state purports to cede land to the federal government, the United States does not have jurisdiction unless it accepts it in the way the statute requires. *Adams v. United States*, 319 U.S. 312, 315, 63 S.Ct. 1122, 1123, 87 L.Ed. 1421 (1943);

Hankins v. Delo, 977 F.2d 396, 398 (8th Cir. 1992).

None of defendants' arguments take away this evidence or make it inconsequential. Leslie tries to dispute the evidence that title of record was not obtained until 1951 by attaching, as Appendix I to its brief, a 1918 Presidential Proclamation and a 1919 Washington session law. However, that session law only granted the U.S. "the right to use for Naval purposes" that harbor area. It, therefore, did not cede exclusive jurisdiction to the U.S. or give up state jurisdiction or authority that is not inconsistent with the harbor's use for Naval purposes. Moreover, neither the Proclamation nor the session law gave the U.S. "title of record".

Defendants also raise and then demolish the “straw man” argument that Washington authority over this land would “lead to an unsustainable patchwork of enclave and non-enclave areas” (Garlock Brief, pp. 29-30), or that “Marines could not guard a vessel moored at non-enclave docks.” Leslie Brief, p. 39. Those arguments confuse two issues. The first issue is the U.S.’s right to use property for military purposes without state interference with those military purposes. The second issue is the right of a state which has concurrent jurisdiction and authority (as does Washington) to regulate activities on that property if that regulation does not interfere with the U.S. military purposes. As to the first issue, there is no doubt that the U.S. acquired the right to use PSNS including the 440 acres for Naval ship repair and military purposes without state interference. As to the second issue, Washington has concurrent authority for property acquired by the United States at PSNS after 1939. As to that property, Washington may regulate activities through tort law that does not interfere with military purposes. The U.S., therefore, does not have exclusive legislative jurisdiction over PSNS so as to turn state tort law into federal law.

This is equally true of PSNS as it was of the missile bases discussed by the Washington Attorney General in AGO 61-62 No. 101:

In other words, even though the federal government is only a proprietor of the Titan missile bases in the Grant county area, it can still exercise exclusive jurisdiction within the sphere of its constitutional powers.

* * *

Therefore, even though the federal government has not obtained exclusive criminal jurisdiction over the lands in question, the jurisdiction of the state of Washington does not entitle it to act in a manner inconsistent with the powers delegated to the federal government by the Constitution of the United States. Thus the state of Washington can do no act which will embarrass the federal government in the exercise of the powers and functions incident to the public purpose to which the lands are devoted.¹⁸ (emphasis added)

Defendants also argue that the “enclave status of the 440 acres of submerged lands” should be analogized to the result in Torrens v. Lockheed Martin Services Group, Inc., 396 F.3d 468 (1st Cir. 2005). Leslie Brief, p. 34. See also Garlock Brief, pp. 26-27. Torrens is distinguishable from this case for at least two reasons. First, in Torrens, the question was whether the Naval Station was federal enclave property over which the U.S. “enjoys exclusive legislative jurisdiction (save as federal law may incorporate local law)”. 396 F.3d at 469 (emphasis

¹⁸ Altieri, *Federal Enclaves: The Impact of Exclusive Legislative Jurisdiction Upon Civil Litigation*, 72 Mil. L. Rev. 55, 90 (1976) states:

Clearly, the great weight of recent authority demonstrates that state jurisdiction continues within the enclave as to matters of private civil litigation involving no interference with federal sovereignty.

added).¹⁹ That is different from Washington law which, after 1939, provided for concurrent jurisdiction and explicitly reserved authority to Washington. Secondly, in Torrens, the U.S. on July 27, 1945 “wrote a letter accepting “‘exclusive’ jurisdiction over all lands in Puerto Rico transferred to the United States for military purposes and as to which jurisdiction had not previously been accepted.” Id. at 471. That, too, is unlike the present case, in which the July 31, 1945 letter accepted “concurrent jurisdiction over all land title of record to which had been acquired” for military purposes by the U.S. L-CP 1140. Unlike Torrens, the acceptance letter in the present case only applies to “title of record” land and therefore, by its terms, the letter excludes the 440 acres. Torrens is thus not applicable.

Defendants’ reliance on Koren v. Martin Marietta Servs., 997 F.Supp. 196, 201, n. 3 (D.P.R. 1998) is also misplaced. They argue that “the Navy’s construction and use of extensive facilities on property acquired for a Naval shipyard constitutes the requisite acceptance of jurisdiction” pursuant to 40 USC § 255 (now codified at 40 USC § 3112). Leslie Brief, pp.25-26, n. 8. See Id. at p. 37, Garlock Brief, pp. 28-29. However, Koren interpreted Puerto Rican law to permit the U.S. taking

¹⁹ Puerto Rican law until 1955 provided with respect to lands acquired for Naval purposes by the U.S., that “all jurisdiction over such lands” by Puerto Rico “shall cease” so long as the U.S. hold the property. Id. at 470.

possession of the property in Puerto Rico to constitute the compliance with Puerto Rican law required by § 3112. 997 F. Supp. at 201. Washington law differs from Puerto Rican law since the only procedure recognized by Washington for acceptance by the U.S. is the filing of an acceptance by the responsible federal official with the Governor of Washington.

This can be seen by the Attorney General opinion cited by plaintiffs in their opening brief, which is entitled to serious consideration by this Court, as held in Wash. Educ. Asso v. Smith, 96 Wn.2d 601, 606, 638 P.2d 77 (1981):

Although not binding, opinions of the Attorney General in construing statutes are entitled to considerable weight. *In re Chi-Doo Li*, 79 Wn.2d 561, 488 P.2d 259 (1971); *Kasper v. Edmonds*, 69 Wn.2d 799, 420 P.2d 346 (1966).

The Attorney General held in the March 13, 1961 opinion that while the federal government had acquired title to Titan Missile bases in Grant County in 1959-60, it had not accepted jurisdiction pursuant to 40 USC § 255, because “[w]e have been informed by the governor’s office that no acceptances have been filed by the federal government involving land in the Grant county area since July of 1945.”²⁰ Since § 255 (§ 3112) turns on

²⁰ It is telling that no defendant attempted to distinguish or even cite this Attorney General opinion.

the laws of the individual states and Washington law differs from Puerto Rican law, Koren is inapplicable.

D. State v. Williams Remains Controlling Authority Rejecting The Trial Court's Decision.

Plaintiffs opening brief argued that “an additional reason for rejecting the trial court’s decision is that it is contrary to this Court’s reasoning” in State v. Williams 23 Wn. App. 694, 696-97, 598 P.2d 731 (1979). In Williams, this Court, after quoting extensively from Ryan v. State, 188 Wash. 115, 126-27, 61 P.2d 1276 (1936), held:

Thus, the method of acquisition of state land by the United States determines the extent of federal jurisdiction over such land. Since Indian Island was acquired by condemnation rather than by purchase, federal jurisdiction over the island is exclusive only for the stated federal purpose of “establishing additional ammunition storage facilities,” and not for purposes of managing shellfish.

Williams, 23 Wn. App. at 697 (emphasis added). See also Willis v. Craig, 555 F.2d 724 (9th Cir. 1977).

The record in this case shows (and defendants do not dispute) that “much of PSNS was not ‘purchased’, but was acquired by condemnation. See, e.g., L-CP 34, 1072-1124.” Appellants Brief, p. 41. Moreover, as discussed above, “[t]here also is no evidence that the purposes for which PSNS was acquired by the federal government are inconsistent with state law responsibility for injuries caused by asbestos-containing products.” Id.

Leslie's is the only brief that even cites Williams. Leslie's analysis is incorrect, however, because it is not true that "[t]he *Williams* Court recognized that exclusive jurisdiction exists over property acquired for a constitutional purpose even if through condemnation. 23 Wn. App. at 696." Leslie's Brief, p. 38, n. 13. That is directly contrary to the portion of Williams quoted supra. Since much of PSNS was acquired by condemnation, the issue then becomes whether state court "litigation of injury claims arising" more than 30 years after such "repairs and construction" is inconsistent with the purposes "for which the land is held." There is no such inconsistency. The record includes no indication that the federal government has found or expressed any difficulty with the adjudication in Washington state courts using Washington law in the many tort actions seeking recovery for asbestos-related injuries occurring at PSNS.²¹

IV. THE TRIAL COURT SHOULD HAVE SUSTAINED PLAINTIFFS' OBJECTIONS TO THE SECOND DECLARATION OF KAREN BOOTH AND SHOULD NOT HAVE TAKEN JUDICIAL NOTICE

The second declaration of Karen Booth and its attachments are the only submitted evidence that plaintiffs challenged on appeal because they

²¹ See, e.g., Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 935 P.2d 684 (1997); Krivanek v. Fibreboard Corp., 72 Wn. App. 632, 865 P.2d 527 (1993); Hoglund v. Raymark Indus., 50 Wn. App. 360, 749 P.2d 164 (1987); and Berry v. Crown Cork & Seal, 103 Wn. App. 312, 14 P.3d 789 (2000).

had no opportunity to respond. See Plaintiff Brief, p. 45. Leslie argues that there was no prejudice because the trial court granted plaintiffs additional time. Leslie Brief, p. 29. However, Leslie is arguing about the wrong Booth declaration. Plaintiffs did not appeal from the first Booth declaration (which is the one referred to by Leslie in its argument).²²

Defendants also argue, citing such cases as Bachman v. Fred Meyer Stores, Inc., 402 F. Supp.2d 1347 (D. Utah 2005) and Koren, that courts have taken judicial notice of facts relating to federal enclaves. However, that does not respond to plaintiffs actual argument which is that judicial notice requires giving plaintiffs an opportunity to be heard under ER 201(e) when, as here, a hearing was requested.²³ Opening Brief, p. 46. If ER 201(e) means anything, then judicial notice cannot be properly taken when its requirements for a hearing were not followed.

V. OTHER ARGUMENTS

A number of the individual defendant's responses point out that plaintiffs did not dispute the granting of summary judgment dismissing

²² Garlock's brief recognized that there was a second Booth declaration and that plaintiffs objected to it. However, Garlock nowhere explains why IMO was entitled to file a second Booth declaration after plaintiffs' supplemental response when plaintiffs filed no evidentiary material as part of its supplemental response. White v. Kent Medical Ctr., 61 Wn. App. 163, 168-169, 810 P.2d 4 (1991), is thus directly on point in describing proper rebuttal documents as being limited to "documents which explain, disprove or contradict the adverse party's evidence".

²³ At L-CP 1496, plaintiffs referred to ER 201 and specifically requested a hearing. No such hearing was given. Rather, the trial court simply ruled in defendants' favor.

“all remaining claims that may have arisen outside of PSNS”. See e.g., Brief Of Respondents Yarway Corporation And Tyco Flow Control, Inc., p. 4, Brief Of Respondent FMC Corporation, pp. 4-5. That is correct but has no affect on plaintiffs’ appeal that summary judgment should not have been given with respect to all of these defendants, based on Mr. Farrow’s asbestos exposure aboard ships being repaired while moored or docked at PSNS.

Defendants Leslie and ITT, at pp. 42-43, n. 16, admit that they had no basis asking for dismissal without prejudice:

Normally the waiver of claims in a complaint would constitute an exclusion of those claims from the lawsuit, and plaintiffs would be free to file a new complaint which encompassed them (subject, of course, to applicable defenses and the potential for removal to federal court).

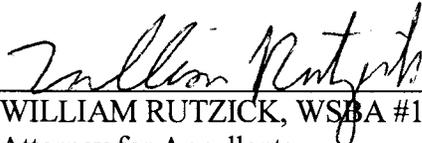
However, these same two defendants take the position that plaintiffs have waived a challenge to this dismissal without prejudice by not raising the issue in their notice of appeal or briefing. Id. These two defendants cite only the judgments relating to themselves. These two defendants’ arguments are wrong because plaintiffs’ notice of appeal appealed from judgments of dismissal in favor of both ITT and Leslie. 1606-1701 Moreover, basically all of plaintiffs’ briefing explained why the summary judgment dismissal of those two defendants, as well as the remaining defendants, was in error and should be reversed.

VI. CONCLUSION

For the foregoing reasons and reasons previously supplied in plaintiffs' opening brief, this Court should reverse the trial court's dismissal on summary judgment as to all of the defendants and this matter should be remanded for trial.

RESPECTFULLY SUBMITTED this 14th day of October, 2009.

SCHROETER, GOLDMARK & BENDER



WILLIAM RUTZICK, WSBA #11533
Attorney for Appellants

INDEX OF ATTACHMENTS

Appendix A Barrow Declaration

Appendix B Dictionary Definition

APPENDIX A

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

GEORGE ABBAY and LYNNE ABBAY,
Husband and Wife,

Plaintiffs,

v.

CLA-VAL CO.; et al,

Defendants.

GEORGE ABBAY and LYNNE ABBAY,
Husband and Wife,

Plaintiffs,

v.

AFTON PUMPS, INC.; et al,

Defendants.

No. 07-2-36540-1 SEA and
07-2-36537-1 SEA

**PLAINTIFFS' MOTION FOR
RECONSIDERATION OF ORDER
GRANTING SUMMARY JUDGMENT
ON BASIS OF FEDERAL ENCLAVE
DISCLAIMER**

1 3. Defendants responded to this particular argument in their reply papers and,
2 indeed, counsel for Leslie Controls, Inc. (Mark Tuvim) addressed it during oral argument,
3 acknowledging that “they’re arguing that the phrase which does not include US naval vessels
4 actually – actually modifies the word disclaim as opposed to federal enclave.” (Tr. at pp. 21-22,
5 a copy of which is attached as Exhibit B.) Counsel for Foster Wheeler (Dirk Bernhardt) also
6 addressed the issue at oral argument, suggesting that the court order plaintiffs to amend their
7 pleadings “to say what they mean,” thus giving Foster Wheeler another opportunity to remove
8 the entire case to federal court. (Tr. at pp. 28.)

9 4. Later in oral argument, counsel for Foster Wheeler raised an unrelated issue as to
10 whether plaintiffs would refile their claims if they were dismissed pursuant to the disclaimer.
11 (Tr. at pp. 29-30.) Attempting to address that issue, I made statements regarding the language of
12 the disclaimer that, in hindsight, were imprecise and ambiguous. My statements, however, were
13 not intended as an abandonment of plaintiffs’ argument that their disclaimer excluded ships.
14 Rather, I was attempting to explain that the disclaimer only applied to land-based exposures and
15 that if any claims had to be refiled, plaintiffs would not try to reinvigorate previously-disclaimed
16 land-based exposures.

17 5. Again, I did not intend to concede or otherwise convey that the disclaimer applied
18 to everything in a federal enclave. More precisely stated, my point would have been that
19 plaintiffs’ disclaimer applied to anything in a federal enclave *on land* as opposed to *on ships*. If
20 interpreted otherwise, my statements are contradictory to the position consistently set forth in
21 plaintiffs’ primary written responses. Regardless of how my comments were interpreted, there
22 was no intent or desire on my part to contradict or otherwise abandon plaintiffs’ position that the
23 disclaimer did not include ship-based claims.

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I declare, under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct to the best of my belief and knowledge.

Dated this 25th day of July, 2008, at Long Beach, California.



Brian P. Barrow

APPENDIX B

Merriam-Webster
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Search

which

2 entries found.

On Off

- 1 which (adjective)
- 2 which (pronoun)

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www.Google.com/Dictionary

Main Entry: **which**

Function: *pronoun*

Date: before 12th century

1 : what one or ones out of a group —used as an interrogative <which of those houses do you live in> <which of you want tea and which want lemonade> <he is swimming or canoeing, I don't know which>

2 : **WHICHEVER** <take which you like>

3 —used as a function word to introduce a relative clause ; used in any grammatical relation except that of a possessive ; used especially in reference to animals, inanimate objects, groups, or ideas <the bonds which represent the debt — G. B. Robinson> <the Samnite tribes, which settled south and southeast of Rome — Ernst Pulgram> ; used freely in reference to persons as recently as the 17th century <our Father which art in heaven — Matthew 6:9(Authorized Version)>, and still occasionally so used but usually with some implication of emphasis on the function or role of the person rather than on the person as such <chiefly they wanted husbands, which they got easily — Lynn White> ; used by speakers on all educational levels and by many reputable writers, though disapproved by some grammarians, in reference to an idea expressed by a word or group of words that is not necessarily a noun or noun phrase <he resigned that post, after which he engaged in ranching — *Current Biography*>

usage see ⁴**THAT**

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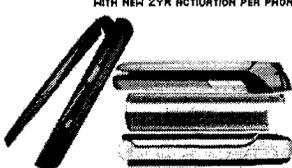
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