

No. 62996-4-I
(Consolidated)

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

MICHAEL FARROW and LIDIA FARROW,
husband and wife,

Appellants,

v.

LESLIE CONTROLS, INC., et al.,

Respondents.

RESPONSE BRIEF OF RESPONDENTS GARLOCK SEALING
TECHNOLOGIES, INC., FAIRBANKS MORSE PUMP CORPORATION,
COLTEC INDUSTRIES, and MCWANE INC.

K&L GATES

G. William Shaw, WSBA # 8573
Michael K. Ryan, WSBA # 32091
Martha Rodriguez Lopez, WSBA #35466
Attorneys for Respondent Garlock
Sealing Technologies, Inc., Fairbanks
Morse Pump Corporation, Coltec
Industries, and McWane Inc.

K&L GATES
925 Fourth Avenue
Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

2009 SEP -9 AM 10:53
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. JOINDER IN RESPONDENTS' BRIEF	2
III. STATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	2
IV. DEFENDANTS' COUNTER-STATEMENT OF THE CASE.....	3
A. Factual Background and Procedural History.....	3
B. The Use of the Federal Enclave Disclaimer in Other Matters.....	8
V. ARGUMENT.....	12
A. The Plain Meaning and Intent of the Farrow's Disclaimer Contradicts the Farrow's Representations on Appeal.	12
1. The Farrow's Reading of the Disclaimer is Not Supported by the Plain Language of the Disclaimer.....	13
2. Even Assuming Some Ambiguity, the Drafter's Intent Must Control.	15
a. The Farrow's May Not Ignore the Intent of Counsel Who Drafted the Disclaimer And Has Acknowledged That the Disclaimer Was Meant to Assert that Navy Vessels Are Not Part of the Federal Enclave.....	16
b. The Farrow's "clarification" is inconsistent with what they claim as their purpose for drafting the disclaimer: avoiding removal.	18
c. The Farrow's Interpretation is a Blatant Attempt at Forum Shopping.....	19
d. The Farrow's Cases on Liberal Pleading Are Distinguishable.....	20
B. PSNS and Vessels Docked There Constitute A Federal Enclave, and Mr. Farrow's Claims Arising Out of Work on Vessels at PSNS Are Therefore Waived by the Farrow's Disclaimer.	22
C. Washington States' Concurrent Jurisdiction Over PSNS Does Not Affect PSNS' Federal Enclave Status.	30
D. The Court Properly Considered The Evidence Provided by Defendants.	33
VI. CONCLUSION.....	36

TABLE OF AUTHORITIES

	<u>Page</u>
Washington State Cases	
<i>Allen v. State</i> , 118 Wn.2d 753, 826 P.2d 200 (1992)	21
<i>Duke v. Johnson</i> , 123 Wash. 43, 211 P.710 (1923)	21
<i>Foss v. Golden Rule Bakery</i> , 184 Wash. 265, 51 P.2d 405 (1935)	16
<i>In re Marriage of Verbin</i> , 92 Wn.2d 171, 595 P.2d 905 (1979)	19
<i>Lockwood v. AC&S, Inc.</i> , 109 Wn.2d 235, 744 P.2d 605 (1987)	32
<i>Mendoza v. Neudorfer Engineers, Inc.</i> , 145 Wn. App. 146, 185 P.3d 1204 (2008).....	31
<i>Mountain Park Homeowners Assn. v. Tydings</i> , 125 Wn.2d 337, 883 P.2d 1383 (1994)	21
<i>Murray v. Joe Gerrick & Co.</i> 172 Wash. 365, 20 P.2d 591 (1933)	24
<i>Schaaf v. Highfield</i> , 127 Wn.2d 17, 896 P.2d 665 (1995)	21
<i>Schoening v. Grays Harbor Community Hosp.</i> , 40 Wn. App. 331, 698 P.2d 593(1985).....	20
<i>State v. Adams</i> , 107 Wn.2d 611, 732 P.2d 149 (1987)	20
<i>White v. Kent Medical Ctr.</i> , 61 Wn. App. 163, 810 P.2d 4 (1991).....	34
Federal Cases	
<i>Akin v. Big Three Indus.</i> , 851 F. Supp 819 (E.D. Tex. 1994)	23, 35
<i>Anderson v. Crown Cork & Seal</i> , 93 F. Supp. 2d 697, 700 (E.D. Va. 2000).....	23

<i>Bachman v. Fred Meyer Stores, Inc.</i> , 402 F.Supp.2d 1342 (D. Utah 2005)	35
<i>Bennett v. Perini Corp.</i> , 510 F.2d 114 (1st Cir. 1975)	26
<i>Brem-Air Disposal v. Cohen</i> , 156 F.3d 1002 (9th Cir. 1998).....	24
<i>Department of Housing and Urban Development v. Rucker</i> , 535 U.S. 125, 152 L.Ed.2d 258, 122 S.Ct. 1230 (2002)	21
<i>Dirma v. United States</i> , 695 F. Supp. 714 (E.D.N.Y. 1988).....	26
<i>Holdren v. Buffalo Pumps, Inc.</i> , 614 F. Supp.2d 129 (D. Mass. May 4, 2009)	9
<i>In re: Welding Rod Products Liability Litigation</i> , 2005 U.S. LEXIS 1265 (N.D. Ohio, January 13, 2005).....	35
<i>Johnson v. John F. Beasley Constr. Co.</i> , 469 U.S. 1211, 84 L. Ed. 2d 328, 105 S. Ct. 1180 (1985)	26
<i>Johnson v. John F. Beasley Constr. Co.</i> , 742 F.2d 1054 (7th Cir. 1984).....	26
<i>Jones v. Gen. Tire & Rubber Co.</i> , 541 F.2d 660 (7th Cir. 1976).....	19
<i>Koren v. Martin Marietta Services, Inc.</i> , 997 F. Supp. 196 (D.P.R. 1998)	28, 29, 35
<i>Mater v. Holley</i> , 200 F.2d 123 (5 th Cir 1952).....	22, 30, 31
<i>Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.</i> , 475 U.S. 574, 89 L.Ed.2d 538, 106 S. Ct. 1348 (1986).....	21
<i>Murray v. Joe Gerrick & Co.</i> 291 U.S. 315, 54 S.Ct. 432, 78 L.Ed. 821 (1934)	23
<i>Nacirema v. Operating Co., Inc. v. Johnson</i> , 396 U.S. 212, 24 L.Ed. 2d 371, 90 S. Ct. 347 (1969)	25
<i>Oberstar v. CBS Corp. et al.</i> , CV 08-118 PA, 2008 U.S. Dist. LEXIS 14023 (C.D. Cal.February 11, 2008).....	9, 10, 15
<i>Paul v. United States</i> , 371 U.S. 245, 83 S. Ct. 426, 9 L. Ed.2d 292 (1963)	22

<i>People of Puerto Rico v. Koedel</i> , 927 F.2d 662 (1st Cir. 1991)	23
<i>Snow v. Bechtel Constr.</i> , 647 F.Supp. 1514 (C.D. Cal. 1986)	35
<i>Torrens v. Lockheed Martin Services Group, Inc.</i> , 396 F.3d 468 (1st Cir. 2005)	23, 26, 27, 29
<i>United States v. Kiliz</i> , 694 F.2d 628 (9th Cir. 1982)	24
<i>United States v. Johnson</i> , 994 F.2d 980, (2d Cir. 1993)	22
<i>Westbrook v. Asbestos Defendants (BHC)</i> , No. C-01-1661 VRW, 2001 U.S. Dist. LEXIS 11575 (N.D. Cal. July 31, 2001)	9
Rules	
CR 12(b)(1)	31
ER 201	35
RAP 10.1(g)	2
Washington State Statutes and Constitutional Provisions	
RCW 37.04.010	23, 24, 30
RCW 37.08.180	23
RCW 37.16.180	30
Wash. Const. Art. XXV, § 1	23
Federal Statutes and Constitutional Provisions	
40 U.S.C. § 255	25
U.S. Const. Art. I, Section 8, Clause 17	22
Other Sources	
www.merriam-webster.com/dictionary/which	14

I. INTRODUCTION

In 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. Although the Complaint was actually drafted by the Farrows' national counsel, the Farrows argued that the disclaimer does not really say what it actually says because it is ambiguous and because it is contrary to the Farrows' local counsel's intent in signing the Complaint. Alternatively, in an effort to avoid the consequences of their disclaimer, the Farrows now ask the Court to ignore overwhelming evidence, including historical documents and cases from the United States Supreme Court, the Washington State Supreme Court and the United States Court of Appeals for the Ninth Circuit, all of which unequivocally establish that Puget Sound Naval Shipyard ("PSNS") in Bremerton, Washington is a federal enclave.

On summary judgment, the trial court correctly concluded: (1) the language in the Farrows' complaint was not ambiguous and was only subject to one reasonable interpretation, and (2) based on this disclaimer the Farrows disclaimed any and all alleged exposure at PSNS, a federal enclave. The trial court's Order, which is consistent with numerous other decisions emanating from the King County Superior Court, should be affirmed. Finally, to the extent the

Farrows argue the trial court improperly considered certain evidence on summary judgment, that argument must also be rejected because the Farrows had ample opportunity to respond to all evidence presented.

II. JOINDER IN RESPONDENTS' BRIEF

Pursuant to RAP 10.1(g), Respondents Garlock Sealing Technologies, LLC, Fairbanks Morse Pump Corporation, Coltec Industries, and McWane Inc. join in the brief submitted by Respondents Leslie Controls, Inc. and ITT Corporation. In addition, Garlock Sealing Technologies, LLC, Fairbanks Morse Pump Corporation, Coltec Industries, and McWane Inc. submit this Respondents' Brief.

III. STATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The trial court's interpretation of the Farrows' disclaimer, which is based both on its plain language and the drafting counsel's interpretation in multiple cases, is correct and should be affirmed.
2. Case law and logic supports the trial court's conclusion that PSNS is a federal enclave, and, consequently, that the Farrows have disclaimed any all exposures that occurred at PSNS.
3. The trial court properly considered the entirety of the evidence provided by the Defendants in their reply in support of summary judgment and the Farrows had an ample opportunity to respond to such evidence.

IV. DEFENDANTS' COUNTER-STATEMENT OF THE CASE¹

A. Factual Background and Procedural History.

The Farrow family alleges that Mr. Farrow was exposed to asbestos while employed by PSNS as a pipefitter and engineering technician from 1953 to 1974. L-CP 1754.² The Farrow family's claims of exposure against the Respondents in this matter are limited to Mr. Farrow's work at PSNS. A-CP 1878-1879.

The Farrow family initially filed their matter in Los Angeles, California, but the California courts ultimately determined that Washington was a more suitable forum based on *forum non conveniens*. Subsequently, the Farrow family filed two separate cases, *Farrow v. Alfa Laval, Inc. et al.* (King County #08-2-07177-4) and *Farrow v. Foster Wheeler Energy Corporation, et al.*, (King County #08-2-07175-8). The California and two Washington complaints, all drafted by the law firm Simon Eddins & Greenstone ("SEG"), included an identical disclaimer that waived any claims arising out of exposure to asbestos from products in a federal enclave:

Plaintiffs hereby disclaim any cause of action or recovery of any injuries caused by any exposure to asbestos dust that occurred in a federal enclave, which expressly excludes U.S. Navy vessels.

¹ This brief is being filed on behalf of Garlock Sealing Technologies, LLC, Fairbanks Morse Pump Corporation, Coltec Industries, McWane Inc. and Crane Co, all of whom were defendants below.

² The Farrow family's appeals in *Farrow v. Leslie Controls, et al.* (No. 62996-4-I) and *Farrow v. Alfa-Laval, Inc. et al.* (No. 63554-9-I) have been consolidated on appeal, and consequently, two sets of clerk's papers have been submitted to the Court. The prefix "L-CP" will hereafter refer to the clerk's papers submitted in relation to the *Leslie Controls* matter, while the prefix "A-CP" will refer to clerk's papers submitted in relation to the *Alfa Laval* matter. Citations to "RT" refer to the Reporter's Transcript.

Plaintiffs also disclaim any cause of action or recovery for any injuries resulting from exposure to asbestos dust caused by any acts or omissions of a party Defendant committed at the direction of an officer of the United States Government.

See L-CP 5, 9 (Washington complaint); L-CP 1311, 1321 (California complaint) (emphasis added).

In *Farrow v. Alfa Laval, Inc.*, subject to this appeal, Defendant IMO Industries, Inc. (“IMO”) moved for summary judgment based on the Farrows’ “federal enclave” disclaimer. L-CP 51. Most Defendants, including Garlock Sealing Technologies, LLC, Fairbanks Morse Pump Corporation, Coltec Industries, McWane Inc. joined in IMO’s Motion for Summary Judgment. A-CP 284, 286, 288, 290, 311. IMO and the joining defendants argued that the Farrows’ disclaimer entitled them to a dismissal of all claims associated with Farrows’ asbestos exposure at PSNS, including any alleged exposures that occurred on Naval vessels docked at PSNS. *Id. See also*, L-CP 51. In response, the Farrows argued that the disclaimer was ambiguous, that local counsel’s intent should govern the interpretation of the disclaimer, and that Defendants did not prove that all of PSNS is a federal enclave. L-CP 229.

The disclaimer’s claimed ambiguity centered on the Farrows’ use of the word “which” in the clause “which expressly excludes U.S. Naval Vessels.” The Farrows alleged that the clause was meant to modify the entirety of the preceding disclaimer language, and was intended to waive all causes of action but for those

occurring on navy vessels. L-CP 229. In the alternative, the Farrowes argued that any post-1945 acquisitions of land in PSNS did not fall under the original grant of the federal enclave, and that IMO had not proven that Mr. Farrow had worked exclusively in those areas which were on the federal enclave. In reply, IMO countered the Farrowes' arguments regarding the intent of the disclaimer, noting its prior usage in other state court proceedings, and provided additional evidence of the metes and bounds of PSNS and the extension of the federal enclave.

L-CP 243.

During oral argument on the motion for summary judgment, Judge Lum asked the Farrow's local counsel, William Rutzick, to clarify who drafted the disclaimer:

THE COURT: Can I ask you, other than national counsel drafting similar language in other cases, you were involved and the other folks and presumably the national counsel drafted this particular language.

MR. RUTZICK: I think that's true. I acknowledge that I didn't draft it. I read it and felt that I understood it, before I used it.

Reporter's Verbatim Report of Proceedings on Appeal ("RT"), September 5, 2008, 25:25-26:6.

Upon hearing the parties' arguments, Judge Lum decided that the language of the disclaimer could not be read as the Farrowes' counsel intended:

THE COURT: Number one, I do not believe, and I will so find, that the disclaimer is not ambiguous. I read the disclaimer language about 20 times, and then I typed it out and put it on a

piece of paper. And I couldn't construe that language in the way Mr. Rutsick wished to have me construe it. That is contrary to how I speak English and read English. I can't come to that interpretation. The interpretation that Mr. Rutsick says, that is not my reading of the facts from the disclaimer language. And the only reasonable interpretation I can glean from that is as the Defendant urges me to interpret it. And I don't believe it is ambiguous, because they would include two unreasonable interpretations. And I can't find there is an ambiguity here.

RT 41:22-42:10.

The Court, however, reserved its decision on the issue of the federal enclave to allow the Farrows additional time to respond to the materials presented by IMO in relation to its Reply:

I would like to accommodate the parties in kind of a different way than just taking a meat cleaver and deciding the whole thing today . . . What is less clear to me is this whole federal enclave issue . . .

I do think Mr. Rutsick and his clients deserve a chance to respond to the materials that were submitted.

RT, 41:19-21; 42:18-19; 43:21-23. The Farrows were granted an additional two weeks to respond to the documents produced in Defendants' reply. RT, 43:21-23.

Pursuant to the Court's briefing schedule, on September 22, 2008, the Farrows filed a "Supplemental Memorandum Relating to Exhibits Attached to the Second Declaration of James Horne." L-CP 1448. The Farrows argued that Washington State retained concurrent jurisdiction over PSNS, and that therefore PSNS could not be an enclave. In addition, the Farrows argued that any land acquired after 1945 did not automatically become part of the federal enclave, and

objected to IMO's submission of a supporting declaration from Karen Booth appending historical documents regarding PSNS.

On September 29, 2008, IMO filed a response to the Farrows' supplemental memorandum, distinguishing the Farrows' case law, submitting a declaration clarifying Karen Booth's qualifications to identify and describe the PSNS historical documents, arguing that judicial notice of the federal enclave status was appropriate, and underscoring the case law supporting a finding that PSNS is a federal enclave. CP-1475. The Farrows filed "Plaintiffs' Objections Relating to IMO's Response to Plaintiff's Supplemental Memorandum" on October 1, 2008, objecting to the submission of a second declaration of Karen Booth, again arguing that the factual assertions in the IMO response were unsupported by the record, and responding to IMO's request that judicial notice be taken of the history and development of PSNS. L-CP 1496.

On October 22, 2008, Judge Lum granted IMO's Motion for Summary Judgment, entered partial summary judgments in favor of multiple defendants, including those specifically listed above, and dismissed all of the Farrows' claims arising from any alleged exposure to asbestos in the federal enclave of PSNS. L-CP 1498-1506. The Farrows moved for reconsideration on October 31, 2008, again raising the reading of the disclaimer, and requesting that the Court clarify that the Farrows raised an opposition to IMO's supplemental memorandum. L-CP 1507. On November 25, 2008, the Court granted the Farrows' request for

clarification, but denied the Farrows' motion in all other respects. L- CP 1515. On July 24, 2008, Defendants Garlock Sealing Technologies, LLC, Fairbanks Morse Pump Corporation, Coltec Industries, and McWane Inc. filed Motions for Summary Judgment on any claims of exposure outside of PSNS. A-CP 284-291. The Farrows did not file oppositions to these summary judgment motions. The Court granted the summary judgment motions on October 22, 2008. A-CP 596-97, 600-03, 606-07.

B. The Use of the Federal Enclave Disclaimer in Other Matters

The federal enclave disclaimer in this matter has been repeatedly used by the Farrows' national counsel, SEG, in other asbestos matters in King County, Washington as a way to forestall removal of plaintiffs' claims.

On October 2007, the case of *Morgan v. AGCO Corp., et al.* was removed by the defendants to the U.S. District Court of Washington. L-CP 1441. Subsequently, local plaintiffs' counsel, all associated with SEG, amended the complaints in the cases of *Abbey v. Cla-Val Co.*, *Smith v. AGCO Corp., et al.*, and *Justice v. Alfa-Laval, Inc.*, and included federal enclave disclaimers identical to the one at issue in the matter. L- CP 1374 (complaint in *Abbey*); L-CP 1411 (amended complaint in *Smith*); L-CP 1415 (motion to amend in *Justice*). The amendment was characterized, in *Justice*, as a way to clarify that the plaintiff was not seeking "recovery for injuries resulting from exposure to asbestos at a federal enclave . . ." L-CP 1431.

SEG has also used this disclaimer in at least two other matters outside of the state, and in both cases they have characterized the disclaimer as a method by which to exclude any federal claims that could lead to removal. *See Oberstar v. CBS Corp. et al.*, CV 08-118 PA, 2008 U.S. Dist. LEXIS 14023, *6-7 (C.D. Cal. February 11, 2008); *Holdren v. Buffalo Pumps, Inc.*, 614 F. Supp.2d 129 (D. Mass. May 4, 2009). In *Oberstar*, Mr. Brian Barrow of SEG appeared on behalf of the plaintiffs and in opposing removal, SEG likened its disclaimer to one used in *Westbrook v. Asbestos Defendants (BHC)*, No. C-01-1661 VRW, 2001 U.S. Dist. LEXIS 11575 (N.D. Cal. July 31, 2001), where plaintiff had more clearly disclaimed “any claims arising out of work done on United States Navy ships”.³ Similarly, in *Holdren*, SEG attempted to “plead around the federal contractor defense by disclaiming any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave, which expressly excludes U.S. Navy vessels.” 614 F. Supp.2d at 150. The court ultimately did not decide the issue of the validity of the disclaimer because it found that removal was improper. *Id.* at 151.

In the King County cases, the inclusion of the federal enclave disclaimer led to a number of summary judgment motions from defendants who attempted to dismiss the plaintiffs’ claims against them for exposures at PSNS. These

³ The *Oberstar* court ultimately found that removal was predicated on the existence of a federal question, rather than the plaintiffs’ complaint, and found that removal was appropriate. *Oberstar*, 2008 U.S. Dist. LEXIS 14023 at 15-16.

summary judgment actions permitted the plaintiffs, and plaintiffs' counsel, to discuss the purpose and meaning of the federal enclave disclaimer. By way of example, in *Abbey*, defendants moved for summary judgment, claiming that any exposures related to Mr. Abbey's work on U.S. Navy Vessels were waived by the the Abbays' disclaimer. In response to the motion, the Abbays argued that:

complaint includes a disclaimer intended to prevent defendants from asserting the existence of federal subject matter jurisdiction and, based on such claimed jurisdiction, removing the case to federal court. Plaintiffs use this disclaimer to expressly limit their claims to those arising under state law, and to preempt the delays associated with the removal and remand procedures.

L- CP 1426. Mr. Barrow of SEG, who had represented the plaintiffs in *Oberstar*, represented the Abbays during the June 23, 2008 hearing on the summary judgment motion. Mr. Barrow claimed that the "issue is [] the ships that Mr. Abbey worked on and where he was exposed to asbestos, whether those are enclaves, and we submit that they are not." L-CP 1266. When defense counsel indicated that the plaintiffs could amend their pleadings to clarify the intent behind their disclaimer, Mr. Barrow stated:

MR. BARROW: Yeah, very briefly.

The way I understand it is – the way I understand counsel's comments is that if the Court - - he's asking us to essentially clarify our disclaimer, if I understand correctly.

I think the disclaimer is very clear that we are disclaiming anything that is in a federal enclave. If Puget Sound Naval Shipyard, the

land that we're talking about is, in fact, a federal enclave, then Mr. Abbey has no claims for the work that he did, if any, on the land.

Our point is that the vast majority, if not all, of his claims, took place – or his exposures took place on the ship, which is not a federal enclave.

L- CP 1271 (emphasis added).

The Court in *Abbey*, consequently, focused on the issue of whether the federal enclave at PSNS extended to U.S. Navy vessels while dry-docked at PSNS. L-CP 1525. Finding that the ships did become part of the enclave, the court dismissed all of plaintiffs' claims arising from exposure during Mr. Abbey's employment at PSNS. L-CP 1531. On a motion to reconsider its dismissal, the Court held that the disclaimer could not be interpreted as excluding U.S. Navy vessels from its scope. L-CP 1534.

In *Smith*, the court again considered the federal enclave disclaimer and its effect on the plaintiffs' claims. In its opposition to summary judgment, plaintiffs' counsel interpreted their disclaimer as

disclaim[ing] any cause of action based upon exposure to asbestos at a federal enclave. To the extent that the defendants have established that Puget Sound Naval Shipyard is a federal enclave, the issue before the Court is whether the ships Mr. Smith worked on . . . while they were docked or moored at PSNS, themselves constitute federal enclaves.

L-CP 1435. Judge Paris Kallas granted summary judgment, finding that "based on the evidence before it, Puget Sound Naval Shipyard, along with its dry-docks and piers, is located within a federal enclave." A-CP 438.

V. ARGUMENT

A. **The Plain Meaning and Intent of the Farrows' Disclaimer Contradicts the Farrows' Representations on Appeal.**

To avoid removal to federal court, the Farrows disclaimed any exposure arising within a federal enclave in their complaint:

Plaintiffs hereby disclaim any cause of action or recovery for any injuries caused by any exposure to asbestos dust that occurred in a federal enclave, which expressly excludes U.S. Navy Vessels.

L- CP 9, ¶ 6. Faced with the potential of dismissal of their claims, the Farrows have attempted at the trial court, and again on appeal, to re-draft their disclaimer. 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 exposures to asbestos that occurred in a federal enclave.” *See* Farrows’ Br. at 13 discussing disclaimer. 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. Farrows’ Br. at 12. The Farrows argue that the clause is inherently ambiguous, and request that the Court permit them to re-draft their complaint when faced with a summary judgment motion seeking enforcement of the disclaimer. *Id.* at 13-14.

The Court should reject the Farrows’ “clarification” of the disclaimer because it is contrary to the plain terms of the disclaimer and the intent of the counsel who drafted the disclaimer.

1. The Farrows' Reading of the Disclaimer is Not Supported by the Plain Language of the Disclaimer.

As is apparent from the inclusion of disclaimers in *Justice*, *Smith* and *Abbay*,² and the federal *Oberstar* and *Holdren* cases, SEG was set on pursuing a strategy of including disclaimers in pleadings in an attempt to prevent the removal it faced in *Morgan*. In all cases but this one, plaintiffs' counsel has defended the disclaimer, unsuccessfully, by arguing that plaintiffs believe that U.S. Navy Vessels docked at PSNS do not become part of PSNS' federal enclave.

In contrast with the other matters, this case presented the Farrows with a dilemma—having filed their complaint originally in California, voluntary dismissal would result in the foreclosure of all their claims. Thus, local counsel admitted they could not dismiss the claim and remove the disclaimer:⁴

Had we dismissed this case without prejudice, and counsel would have pointed out, we could have dismissed ourselves out of the case. And that, while a good thing, from the defendant's viewpoint, is not that good for the Plaintiff. This case had been filed in California, and that is in the record.

RT, 26:15-20. Only 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.

⁴ To avoid the result here, the Farrows could have, however, sought to amend their complaint to remove the disclaimer. For whatever reason, they chose not to do so.

The Farrows argue that their position on the meaning of the disclaimer is supported by the common usage of the word “which,” and their claim that the language which expressly excludes U.S. Navy Vessels would be surplusage or insignificant “since a plaintiff cannot make a legal assertion more true simply by stating it in a complaint.” Farrows’ Br. at 29. The Farrows concede, however, that under the rules of grammar, the word “which” can be used to restrict the last antecedent word. Farrows’ Br. at 17. Although the Farrows 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. As the court in *Abbey* found when faced with the same disclaimer, the only logical, grammatically appropriate reading is the one proposed by the Defendants:

Pleadings are subject to the same rules of construction that apply to other legally significant documents. Applying basic rules of grammar, the Court concludes that the term ‘which’ modifies the immediately antecedent noun ‘federal enclave,’ as opposed to the distant verb ‘disclaim.’

L- CP 1534.

Further, the Farrows argue that the court should not interpret the words of the disclaimer in a way that would render it a superfluous and ineffective statement of a legal proposition. Farrows’ Br. at 28-29. This argument is undermined by the fact that this is precisely the substance of SEG’s arguments in

other cases in state court: that vessels docked at PSNS do not become part of PSNS' federal enclave. See L- CP 1262-1266. Instead of surplusage, the language regarding U.S. Navy vessels should be interpreted in light of SEG's arguments in other cases involving the same disclaimer. In that light, the language is not superfluous or illogical, but an expression of the Farrows' position that U.S. Navy vessels are not legally part of an enclave, a clarification that plaintiffs do not waive that argument on removal, and a practical deterrent to defendants who choose to raise the issue of removal. If, as the Farrows claim, their intent was to indicate that their disclaimer did not apply to U.S. Navy Vessels, they could have stated so plainly with a separate sentence.⁵ Nowhere in the record does the Farrows' counsel explain or indicate their rationale for drafting the disclaimer with such language, not only in this matter but in other cases in the jurisdiction, as discussed further *infra*. The Court should uphold the lower court's ruling and find that the Farrows have disclaimed all causes of action which occur in a federal enclave.

2. Even Assuming Some Ambiguity, the Drafter's Intent Must Control.

The Farrows argue that they are entitled to clarify their intent with the disclaimer, and note that they are entitled to all favorable inferences on what the

⁵ In fact, as discussed *supra*, SEG has analogized their disclaimer to one which waived "any claims arising out of work done on United States Navy ships." *Oberstar*, 2008 U.S. Dist LEXIS 14023 (C.D. Cal. Feb. 11, 2008). Based on its experience in other matters, counsel cannot now argue

disclaimer actually says. *See* Farrows’ Br. at 14. This argument fails for four reasons. First, even if the Farrows were permitted to clarify their intent, they cannot ignore their California counsels’ (who is also the drafter) repeated characterization of the intent of the disclaimer. Second, the Farrows’ “clarification”, which amounts to nothing short of a re-writing of the complaint, is inconsistent with what they claim as their purpose for drafting the disclaimer: avoiding removal. Third, the Farrows’ argument would have the practical effect of allowing the Farrows to forum shop. Finally, the cases cited by the Farrows for the proposition that they may clarify their intent on summary judgment are distinguishable from the case at bar.

a. The Farrows’ May Not Ignore the Intent of Counsel Who Drafted the Disclaimer And Has Acknowledged That the Disclaimer Was Meant to Assert that Navy Vessels Are Not Part of the Federal Enclave.

The Farrows should be prevented from presenting a “clarifying interpretation” for the disclaimer which is at odds with the representations that their co-counsel, who is also the drafter, has made repeatedly in similar contexts before the courts in Washington and elsewhere. It is a basic legal principle that any ambiguity is construed against the drafter. *Foss v. Golden Rule Bakery*, 184 Wash. 265, 268, 51 P.2d 405 (1935). If this is true, then any ambiguity must be construed against the Farrows. This point, however, need not be resolved on this

that it did not know of the ambiguity in its chosen language, or of clearer ways to express its

appeal because the intent and purpose of the drafter of the Farrows' disclaimer is clear.

The Farrows' local counsel, Mr. Rutzick, acknowledged at oral argument that he did not draft the Complaint at issue. When asked by Judge Lum, whether "presumably the national counsel drafted this particular language," Mr. Rutzick stated that "I think that's true. I acknowledge that I didn't draft it." RT, 25:25-26:6. Thus, as a practical matter, Mr. Rutzick's understanding of what the disclaimer means is not dispositive on the issue. SEG initially filed the Farrows' matter on November 13, 2007 in Los Angeles, California, with the federal enclave disclaimer language. L-CP 1311, 1321. On February 26, 2008, local counsel for the Farrows filed the present complaint on behalf of the Farrows with the federal enclave disclaimer language. L-CP 9. SEG has since appeared more than once in this action on behalf of the Farrows. L- CP 1763 (Plaintiffs' Responses to Interrogatories and Requests for Production by Defendant Crane Co., signed by Alexandra Shef of SEG, in the *Farrow v. Alfa Laval* matter); L- CP 1884 (appearance of Ethan Horne of SEG on behalf of the Farrows in the deposition of Mr. Farrow in both the *Leslie Controls* and the *Foster Wheeler* matters).⁶ SEG's

intent.

⁶ For example, Mr. Ethan Horne of SEG attended and defended Mr. Farrow at his deposition in Washington State. See L-CP 1884. Thus, given this, and the interrogatories referenced above, any attempt by the Farrows' local Washington counsel to distance themselves from SEG in this matter should be taken with the proverbial grain of salt.

involvement with the draft of the Complaint, the federal enclave disclaimer, and the subsequent proceedings cannot be denied.

Further, there is no need to intuit SEG's intent in drafting the disclaimer. As discussed, *supra*, SEG has included the disclaimer in various complaints in King County, and its purpose and intent has been explained on numerous occasions as a tactic to avoid removal. In the motion to amend *Justice*, in the arguments on summary judgment in *Smith*, and on oral argument in *Abbay*, SEG underscored that the crux of their argument is that federal vessels cannot be a part of a federal enclave, and that their disclaimer was "very clear that we are disclaiming anything that is in a federal enclave." *E.g.* L- CP 1271 (emphasis added); L-CP 1415. If the Farrows' intent is to be credited, then the logical result should be to find that SEG has clarified its intent: to state, by way of their disclaimer, that they do not believe U.S. Navy vessels are part of the federal enclave.

b. The Farrows' "clarification" is inconsistent with what they claim as their purpose for drafting the disclaimer: avoiding removal.

The examples from the *Abbay*, *Smith* and *Justice* matters make it clear that the Farrows' intent and purpose in drafting this disclaimer was to avoid removal by claiming that U.S. Navy Vessels are not part of a federal enclave. However, if the Farrows' argument is to be credited—that they did not waive ship-based exposures even if they occurred in U.S. Navy Vessels docked or moored at a

federal enclave—then it logically follows that Mr. Farrow’s exposures would be subject to removal to federal court. Farrows’ Br. at 13-14. If this is correct, the Farrows disclaimer is rendered ineffective in its totality, since by its own terms it does not accomplish its intended purpose—avoiding removal.

c. The Farrows’ Interpretation is a Blatant Attempt at Forum Shopping.

The Farrows’ interpretation should be discredited because it also amounts to a blatant attempt at forum shopping. Forum shopping has been described by the Washington Supreme Court as “divisive and deplorable.” *In re Marriage of Verbin*, 92 Wn.2d 171, 184, 595 P.2d 905 (1979); *cf. Jones v. Gen. Tire & Rubber Co.*, 541 F.2d 660, 664 (7th Cir. 1976) (Unlike here, “[t]here was no basis upon which the district court could conclude that the plaintiff was employing artful manipulation in terms of the complaint in order to defeat removal.”). If the Farrows are not held to the plain terms of their disclaimer, and are allowed to avoid the drafter’s purpose and intent based on local counsel’s personal belief of what the disclaimer means, they will be rewarded for intentionally drafting an “ambiguous” disclaimer that leaves both the Court and counsel wondering what the disclaimer actually means. Such tactical maneuvers through “ambiguous” pleadings should be discouraged.

d. The Farrows' Cases on Liberal Pleading Are Distinguishable.

Finally, assuming for purposes of argument that the Farrows' disclaimer is ambiguous and that the drafter's intent and purpose can be completely ignored, the Farrows may not re-write the complaint on summary judgment.

The cases cited by the Farrows for the proposition that they may "clarify" the meaning of the disclaimer in the Complaint are easily distinguished. In both *Schoening v. Grays Harbor Community Hosp.*, 40 Wn. App. 331, 698 P.2d 593(1985), and *State v. Adams*, 107 Wn.2d 611, 732 P.2d 149 (1987), the central issue was whether the complaint, coupled with the plaintiffs' subsequent pleadings, provided notice of the nature of the plaintiffs' claims to the defendants and the court on summary judgment. In *State v. Adams*, for example, the trial court granted summary judgment on behalf of the plaintiffs, but declined to grant a money judgment because the phrase "money judgment" was not used in the complaint. On appeal, the Court disagreed, finding that the liberal pleading standards allowed for clarification as to the substance of the judgment requested, suggesting, *inter alia*, that the defendants had received notice of the requested relief. *Id.* at 620. This is distinguishable from the case at bar, where the Farrows claim that the purpose of the tactically crafted clause was a way to forestall removal, not, as in the cited cases, to broadly state claims that could be later clarified as the case developed.

Moreover, a liberal reading of the pleadings still required that the Farrows follow basic rules of grammar and construction. *Cf. Dept. of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131, 152 L.Ed.2d 258, 122 S.Ct. 1230 (2002) (rejecting statutory interpretation that “runs counter to the basic rules of grammar”); *Duke v. Johnson*, 123 Wash. 43, 49, 211 P.710 (1923) (while “not necessary to always pay critical heed to technical grammatical rules” in interpretation, “at the same time, [] some weight should be given to such rules and an effort should be made to construe the language in accordance with those rules rather than contrary to them.”). Further, parties opposing summary judgment are entitled only to *reasonable* inferences and doubts. *E.g., Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995); *Mountain Park Homeowners Assn. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994); *Allen v. State*, 118 Wn.2d 753, 760, 826 P.2d 200 (1992); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L.Ed.2d 538, 106 S. Ct. 1348 (1986) (existence of “some metaphysical doubt as to the material facts” is insufficient to defeat summary judgment).

Here, the Farrows interpretation of their disclaimer is illogical, strained, and unsupported by its plain language, the interpretation provided by their counsel, and by logic. The Farrows’ attempt to change the meaning and effect of their federal enclave disclaimer should be rejected, and the trial court’s ruling on this point should be affirmed.

B. PSNS and Vessels Docked There Constitute A Federal Enclave, and Mr. Farrow's Claims Arising Out of Work on Vessels at PSNS Are Therefore Waived by the Farrows' Disclaimer.

The Farrows argue that summary judgment was inappropriate because IMO did not establish that the portions on which Mr. Farrow worked were a federal enclave. Article I, Section 8, Clause 17 of the United States Constitution, which is commonly referred to the "Enclave Clause", states:

The Congress shall have Power [...]

To exercise exclusive Legislation in all Cases whatsoever, [over the District of Columbia] and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

Paul v. United States, 371 U.S. 245, 263, 83 S. Ct. 426, 9 L. Ed.2d 292 (1963)

(quoting Enclave Clause) (emphasis added). Any "places" that the federal government acquires from a state either through purchase or eminent domain under this Clause become a "federal enclave." *Id.* at 263-67; *see also United States v. Johnson*, 994 F.2d 980, 984 (2d Cir. 1993).⁷ Claims which arise in a federal enclave are removable to federal court. *Mater v. Holley*, 200 F.2d 123, 123 (5th Cir 1952). Consonant with the Constitutional language, military installations are commonly found to be federal enclaves. *Torrens v. Lockheed*

⁷ Until 1940, the federal government did not have to formally accept jurisdiction ceded by a state. *Johnson*, 994 F.2d at 984. In 1940, Congress passed 40 U.S.C. § 255 (now codified at 40 U.S.C. § 3112), which required that the United States formally accept jurisdiction over land it acquired through, either "filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated." 40 U.S.C. § 3112.

Martin Services Group, Inc., 396 F.3d 468, 473 (1st Cir. 2005) (the Roosevelt Roads Naval base in Puerto Rico); *Anderson v. Crown Cork & Seal*, 93 F. Supp. 2d 697, 700 (E.D. Va. 2000) (Norfolk Naval Shipyard); *People of Puerto Rico v. Koedel*, 927 F.2d 662, 665 (1st Cir. 1991) (Fort Buchanan in Puerto Rico); *Akin v. Big Three Indus.*, 851 F. Supp 819, 822 (E.D. Tex. 1994) (Tinker Air Force Base).

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). The trial court's conclusion is supported by the United States Supreme Court and Washington State Supreme Court. In *Murray v. Joe Gerrick & Co.* the United States Supreme Court stated:

By statute passed in 1891 the state consented to the acquisition of a tract of land by the United States for a navy yard or other specific uses, and ceded jurisdiction over the same to the federal government, retaining only concurrent jurisdiction for the service of civil and criminal process issued under the authority of the state. Pursuant to this consent, the United States acquired what is now known as Puget Sound Navy Yard.

291 U.S. 315, 316-17, 54 S. Ct. 432, 78 L. Ed. 821 (1934) (emphasis added) (footnote omitted). The Court held that the federal government had jurisdiction over the Yard by virtue of (i) the federal government's acquisition of the land for purposes of constructing a dock yard and (ii) the state of Washington's consent to the acquisition of cession of jurisdiction. *Id.* at 318.

Similarly, in *Murray v. Joe Gerrick & Co.*, the Washington Supreme Court stated: “[T]his state, by Legislative enactment, gave its consent to the acquisition of the Puget Sound Navy Yard by the Federal government and ceded exclusive jurisdiction thereto.” 172 Wash. 365, 367, 20 P.2d 591 (1933). The Ninth Circuit joined the United States Supreme Court and the Washington State Supreme Court in a case dealing with a traffic violation that occurred at PSNS in a decision that, notably, post-dates Mr. Farrows’ dates of exposure. *United States v. Kiliz*, 694 F.2d 628, 629 (9th Cir. 1982) (noting violation occurred at PSNS, a federal enclave); *cf. Brem-Air Disposal v. Cohen*, 156 F.3d 1002, 1003 (9th Cir. 1998) (“The United States Navy operates the Puget Sound Naval Shipyard in the city of Bremerton, Washington.”). IMO supported this conclusion with documentary evidence, acquired in part from a FOIA request, that illustrated the history of PSNS and its growth throughout the period. L-CP 56-62, 74, 252-254, 257. Thus, binding authority and documentary evidence supports the trial court’s conclusion that PSNS is a federal enclave.

The Farrows forward a number of arguments, all of which are unavailing. First, the Farrows argue that land acquired after the passage of Washington’s cession statute, RCW 37.04.010 in 1939 cannot be a federal enclave. Second, the Farrows argue that any land acquired after the United States’ Secretary of War formally accepted concurrent jurisdiction in 1945 also falls outside of the federal enclave because the federal government has not explicitly accepted jurisdiction

over that land pursuant to the requirements of 40 U.S.C. § 255. Finally, the Farrows argue that it is Defendants' burden to show that Mr. Farrow worked in those PSNS areas which are within the federal enclave in order to establish that the waiver applies.

The Farrows' attempt to cleave PSNS into pockets of enclave and non-enclave jurisdiction is simply unsupported. First, the Farrows' "proof" of pockets of post-1945 non-enclave land lies in the construction of Dry Dock 6, which, as they correctly point out, was dedicated in 1962. Farrows' Br. at 44 (citing "*Nipsic to Nimitz: A Centennial History of Puget Sound Naval Shipyard*," excerpted in Exhibit A to the Farrow Brief). However, the pages excerpted from the book show that Dry Dock 6 was attached to land which had been a part of PSNS, and used for military activity, long before 1945. See Farrows' Br., Appendix A, p. 4 (showing, with hatch marks, the proposed location of Dry Dock 6 on Sinclair Inlet, extends inward into already existing land). In addition, Dry Dock 6 was flanked, on both sides, by preexisting moors, piers and dry docks on Sinclair Inlet. *Id.* Additional photographs from the same book show that the land and many of the surrounding piers and dry docks existed in the 1930s. See, e.g., Brief of Respondents Leslie Controls, Inc. and ITT Corporation, n. 12. Dry docks extending from land are considered extensions of said land. *Nacirema v. Operating Co., Inc. v. Johnson*, 396 U.S. 212, 214-15, 24 L.Ed. 2d 371, 90 S. Ct. 347 (1969); see also, e.g., *Bennett v. Perini Corp.*, 510 F.2d 114, 116 (1st Cir.

1975); *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1063 n. 8 (7th Cir. 1984), cert. denied, 469 U.S. 1211, 84 L. Ed. 2d 328, 105 S. Ct. 1180 (1985); *Dirma v. United States*, 695 F. Supp. 714, 718 (E.D.N.Y. 1988). As such, even though Dry Dock 6 was built after 1945, it was attached to and protruded from land which is part of the federal enclave, was built on Sinclair Inlet, also part of the federal enclave, and became part of the federal enclave when built.

The First Circuit Court of Appeals decision in *Torrens v. Lockheed Martin Services Group, Inc.*, 396 F.3d 468 (1st Cir. 2005) is helpful on this point. In *Torrens*, a question arose concerning whether the Roosevelt Roads U.S. Naval station in Puerto Rico was a federal enclave. The United States had acquired property bounded on one side by a bay, land-filled it, and constructed piers and dry docks attached to the filled land. Questions as to the federal enclave status arose because the patchwork of land acquisitions and deeds seemingly did not include the filled lands which were launching points for the piers or the submerged lands upon which the piers were constructed. The court nevertheless found all the filled area at issue to be part of a federal enclave. *Torrens*, 396 F.3d at 473.

The Farrows argue that *Torrens* can be distinguished because the facilities were already in the process of being built at the time of the United States' acceptance of the conveyance. Farrows' Br. at 43. This is too narrow a reading of

Torrens. The Court explicitly addressed the issue of construction after the conveyance:

Although this comment was not developed, plaintiffs may be intending to suggest that piers and dry dock where the plaintiffs worked may rest on or extend from land reclaimed from the water and therefore possibly not literally within the metes and bounds set out in the Forrestral letter as the parcel taken in 1941 and for which exclusive federal authority was accepted.

From the maps and descriptions furnished, it appears that the Navy acquired in 1941 a significant piece of property bounded on one side by the bay. As *Nieves* indicates, construction of the piers... proceeded apace between 1941 and 1943. The United States asserts, and the plaintiffs have not specifically disputed, that the property described in the Forrestral letter was the launching point for the piers area construction.

Whether the Navy built outward from the deeded land into the bay and whether the work at issue in this lawsuit occurred on the deeded property or the reclaimed land could be explored in the district court if the issue matters; but it may well not matter. Assuming the Navy filled in submerged land that it did not already own under the strict terms of the deed or otherwise- an issue on which we take no view- the United States certainly took the land when the Navy occupied it and built its permanent facilities upon it.

We decide only that the Forrestral letter, assuming that it is authentic and was sent, would constitute an acceptance of federal authority under the 1940 statute for the parcel it describes, any adjacent land reclaimed from the bay, and any piers and dry docks built upon the parcel or the reclaimed land.

Id. at 473. The *Torrens* court relied, in part, on the Navy's building upon the land and acceptance of the land when it built facilities upon it. It was the totality of

these factors that convinced the Court, rightfully, that the land, piers and dry docks were tethered to the enclave, and that the Navy had extended its acceptance to it.

Similarly, in *Koren v. Martin Marietta Services, Inc.*, 997 F. Supp. 196 (D.P.R. 1998), an employee of federal contractor brought action against the defendants for violations of Fair Labor Standards Act (FLSA) and Puerto Rico's wage-and-hour laws for work performed at, amongst other places, the Roosevelt Roads Naval Base. The question before the court was whether the United States had accepted jurisdiction over Roosevelt Roads, when, although Roosevelt Roads had been acquired by 1955, it was unclear whether Roosevelt Roads had been acquired before the receipt of a 1945 letter of acceptance by the Secretary of War. *Id.* The Court reasoned that Roosevelt Roads was an enclave, even though the state statute seemingly ceded land automatically upon the U.S. government's possession:

At first blush, the simple requirements of Puerto Rico's Act of 1903 for the attachment of exclusive jurisdiction might seem to betray the purpose of § 255, which was enacted "to ensure that ... automatic cession statutes did not saddle the United States with unwanted jurisdiction." . . . But the Court holds that the provision of Puerto Rico's Act of 1903 requiring the federal government to actually take possession of the land envisions a sufficiently affirmative action on the part of the United States to render Puerto Rico's Act of 1903 consistent with 40 U.S.C. § 255. Furthermore, as a simply practical matter, the Court can take judicial notice that the United States Navy exercises complete dominion over Roosevelt Roads Naval Base and has for many years. Clearly, both the United States and Puerto Rico governments appear in

agreement that Roosevelt Roads is a federal enclave. In other words, the situation does not implicate the concerns underlying § 255-that jurisdiction would be foisted upon the federal government.

Id. at 201, n. 3 [Emphasis added.].

Torrens and *Koren* both stand for the commonsense proposition that where, as here, (1) post-1945 construction at PSNS is within the metes and bounds of the original grant of Sinclair Inlet; (2) the construction is inarguably intermingled and attached to land which predates the U.S. governments' acceptance of jurisdiction, and (3) the area has been used in a manner indistinguishable from other areas which are within PSNS, there is no risk of implicating the concerns underlying the federal requirements of cession and acceptance.

Taken to its logical result, the Farrows' argument would lead to an unsustainable patchwork of enclave and non-enclave areas. Post- 1945 extensions to buildings and docks, moors and piers, would not be subject to federal enclave jurisdiction, not because of their location or use by the federal government, but because of their year of construction. Indeed, by the Farrows' reasoning, PSNS workers may have straddled the federal and non-federal portions of PSNS depending on where they were on ships docked at PSNS.⁸ The Bremerton police department could have, in war time, traveled through the federal enclave to

conduct investigations on those portions of ships that happened to be attached to areas constructed after 1945. Indeed, Washington State would have had the authority to enforce state laws on those portions of PSNS under its jurisdiction, including labor laws or laws restricting the use of hazardous materials such as asbestos. This result is inconsistent with the case law, and subverts the purpose of the creation of a federal enclave.

C. Washington States' Concurrent Jurisdiction Over PSNS Does Not Affect PSNS' Federal Enclave Status.

The Farrows argue that Washington State's concurrent jurisdiction over PSNS eliminates PSNS' status as a federal enclave. Farrows' Br. 35. The State of Washington has retained jurisdiction to execute its civil and criminal process on federal lands acquired by the United States by purchase or condemnation. RCW 37.16.180, RCW 37.04.010, *et seq.* However, it is simply inconsequential whether jurisdiction over PSNS is concurrent, as the Farrows claim, rather than exclusive. Cases have held that a state's reservation of concurrent jurisdiction will not destroy an areas' status as a federal enclave. In *Mater v. Holley*, 200 F.2d 123 (5th Cir. 1952), for example, the plaintiff alleged that she suffered personal injuries within the boundaries of Fort McPherson, Georgia. *Id.* at 123. The federal district court dismissed the case for lack of federal jurisdiction. *Id.* On appeal, the Fifth Circuit held that "[e]xisting federal jurisdiction is not affected by

⁸ Consequently, if the Court finds that PSNS is not a federal enclave in its entirety, Defendants request that remand be premised on the Farrows' ability to establish that Mr. Farrow's exposures

concurrent jurisdiction in state courts.” *Id.* at 125. Moreover, the Court acknowledged that “an action for personal injuries suffered on a reservation under the exclusive jurisdiction of the United States, being transitory, may be maintained in a state court which has personal jurisdiction of the defendant.” *Id.* at 123. Having found that the district court retained jurisdiction, the Fifth Circuit reversed. The Washington Court of Appeals, Division 2, cited *Mater* with approval in *Mendoza v. Neudorfer Engineers, Inc.*, 145 Wn. App. 146, 185 P.3d 1204 (2008). The *Mendoza* plaintiff was allegedly injured while working within Fort Lewis, Washington. The defendants moved to dismiss the complaint pursuant to Civil Rule 12(b)(1) claiming that Washington lacked subject matter jurisdiction over a tort committed on federal land. *Mendoza*, 145 Wn. App. at 149. The trial court dismissed the case with prejudice. *Id.* On appeal, the Court clarified that “exclusive jurisdiction, in the sense of exclusive sovereignty, does not divest state courts of jurisdiction over personal injury causes of action.” *Id.* at 151. “That the injuries were allegedly inflicted within a federal enclave, Fort Lewis, does not limit Washington’s subject matter jurisdiction.” *Id.* at 152. *See, e.g., Murray*, 291 U.S. at 316 (ruling that PSNS was a federal enclave under statutes by which Washington retained concurrent jurisdiction for service of state-issued civil or criminal process).

occurred in the parts of PSNS which are not considered to be a part of the federal enclave.

Defendants have submitted persuasive legal and evidentiary proof that PSNS was at all relevant times a federal enclave. It was the Farrows' burden to show (1) that parts of PSNS are not an enclave; and (2) that the complained-of exposures occurred in those parts of PSNS that are not enclaves. *E.g. Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 245-47, 744 P.2d 605 (1987) (in order to avoid summary judgment in an asbestos case, a plaintiff has the burden to offer evidence supporting a reasonable inference that there was exposure to respirable asbestos fibers from a defendant's product).⁹ Indeed, Mr. Farrow could not testify as to the location of the vessels he worked on while at PSNS.¹⁰ Not having done so, the Court should affirm the trial court's conclusion that PSNS is an enclave.

⁹ Given that the Farrows claim that Mr. Farrow's exposures as a pipefitter occurred between 1954 and 1962, Plaintiffs' central argument, that Dry Dock 6 was dedicated in 1962 and is consequently outside the federal enclave, postdates a significant chunk of Mr. Farrow's exposure.

¹⁰ Mr. Farrow testified in his deposition as follows:

Q. I've asked you about a couple of the vessels that you worked on and where you did this work on the vessels, where the vessels were located, and I'm going to go through the vessels that I have in my notes and ask you that same question.

You mentioned that you weren't sure, the first time you worked on the PRINCETON, whether it was in dry dock or tied to a pier, but it was obviously one or the other, correct?

A. Yes.

Q. Okay. How about the second time? Was that in dry dock or was that tied to a pier?

A. It was a much longer repair period, so very likely it was in a dry dock, but I don't recall if it was in a dry dock or not, but it was --

MR. HORN: Well, then, don't guess.

THE WITNESS: Yes. Okay.

Q. (By MR. MATTINGLY) How about the USS MIDWAY?

D. The Court Properly Considered The Evidence Provided by Defendants.

The Farrowes argue that documents regarding PSNS' status as a federal enclave were improperly considered by the trial court because the Court improperly took judicial notice of the materials, and the Farrowes' did not have the opportunity to respond to such materials. Farrowes' Br. at 45-46. This argument is false for several reasons.

First, Defendant IMO's opening brief on summary judgment provided clear federal and state authority that PSNS was a federal enclave, and the Farrowes objected in response that said evidence was not enough. L-CP 51, 229. Consequently, the documents provided on reply were directly responsive to the Farrowes' opposition and invitation to provide additional information which, at

A. MIDWAY?

Q. Yes. Where was the MIDWAY located at PSNS when you worked on it?

A. I don't recall if it was in a dry dock or alongside a pier.

Q. So, again, that's something that you just don't have in your memory today?

A. I don't recall.

Q. Okay. How about the CORAL SEA?

A. The same.

Q. Okay. Is that going to be the same for each of these vessels?

A. Yes.

Q. Okay. Okay. Would it be the same for all of the subs as well?

A. Yes. I don't recall which were in dry dock and which were alongside the pier.

L-CP 1910-1911.

best, underscored the legal authority already provided to the court. This is distinguishable from the circumstances in *White v. Kent Medical Ctr.*, 61 Wn. App. 163, 168-169, 810 P.2d 4 (1991), where the defendants, having moved for summary judgment on issues of duty and the plaintiffs' adherence to procedural requirements, could not raise issues regarding proximate cause for the first time on reply.

Second, and perhaps most importantly, is that this issue was discussed at length at oral argument before Judge Lum. At the conclusion of oral argument, Judge Lum ruled that the disclaimer was not ambiguous but provided the Farrows an opportunity to respond to the complained-of documents—in fact they had several weeks to do it. RT, 44:14-45:11.¹¹ The Farrows availed themselves of this opportunity and submitted a supplemental memorandum contesting PSNS's status as a federal enclave, and challenging the declaration of Karen Booth and the historical PSNS documents attached thereto as hearsay. L-CP 1448. The Farrows also specifically addressed the exhibits to IMO's motion individually, challenging the information and the clarity of some of the attached maps, and that the information provided in the documents substantiated IMO's arguments regarding the metes and bounds of PSNS. L- CP 1453-56. After IMO filed its response to the supplemental brief and a second declaration of Karen Booth, the

¹¹ Moreover, the Farrows' counsel cannot realistically complain that they did not have notice of these documents. The Farrows' counsel, Schroeter Goldmark & Bender, previously obtained all

Farrows filed “Objections Relating to IMO’s Response to Plaintiff’s Supplemental Memorandum,” objecting to IMO’s evidence in response, its arguments regarding judicial notice, and the supplemental declaration of Karen Booth. L-CP 1496. After Judge Lum rendered his order, the Farrows filed a Motion for Reconsideration, asking the court to reconsider its reading of the disclaimer. L-CP 1507. Any discussion of these submissions, however, is curiously absent from the Farrows’ Brief.

Finally, numerous courts have taken judicial notice of the federal enclave status of a military installation. *See also, Bachman v. Fred Meyer Stores, Inc.*, 402 F.Supp.2d 1342, 1347 (D. Utah 2005) (taking judicial notice that Hill Air Force Base a federal enclave); *Koren*, 997 F.Supp. at 201 n. 3 (“[A]s a simply practical matter, the Court can take judicial notice that the United States Navy exercises complete dominion over Roosevelt Roads Naval Base and has for many years.”); *Snow v. Bechteel Constr.*, 647 F.Supp. 1514, 1516 (C.D. Cal. 1986) (taking judicial notice that San Onofre Nuclear Generating Station is on a federal enclave); *In re: Welding Rod Products Liability Litigation*, 2005 U.S. LEXIS 1265, *20 (N.D. Ohio, January 13, 2005) (“When the Appellants’ claims arise from exposure to chemicals on a United States military base in furtherance of their employment duties, enclave jurisdiction is properly invoked.” [citing *Akin v. Big Three Industries, Inc.*, 851 F.Supp. 819, 822 (E.D. Tex. 1994)]); ER 201

of these documents as part of the *Abbey* matter, for which they served as local counsel for SEG.

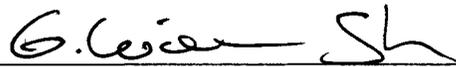
(court may judicially notice a fact “not subject to reasonable dispute in that it is [] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable be questioned.”).

The Farrows, therefore, had time and repeated opportunities to challenge the Defendants’ evidence and submissions to the Court. To the extent the Court took judicial notice concerning the enclave status of PSNS, the trial court entertained substantial and comprehensive briefing and oral argument regarding the naval shipyard’s status, the prior court opinions which concluded that PSNS is a federal enclave, and the evidence supporting that conclusion. L-CP 1448; RT 44:14-45:11

VI. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court affirm the trial court in all respects.

K&L GATES



G. William Shaw, WSBA # 8573

Michael K. Ryan, WSBA # 32091

Martha Rodriguez Lopez, WSBA #35466

Attorneys for Respondent Garlock
Sealing Technologies, Inc., Fairbanks
Morse Pump Corporation, Coltec
Industries, and McWane Inc.

See, eg., L-CP 253 (discussing the use of the documents in *Abbey*.)