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Case No. N11C-04-187 PLA

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STEPHEN BERTONE	)	
	)	
Plaintiff,	)	**C.A. NO. _____**
	)	
vs.	)	
	)	
BP EXPLORATION & PRODUCTION INC.; and HALLIBURTON ENERGY SERVICES, INC.	)	**TRIAL BY JURY OF TWELVE DEMANDED**
	)	
Defendants.	)	

Plaintiff's Original Complaint

Plaintiff Stephen Bertone ("Plaintiff") complains of Defendants BP Exploration & Production Inc. ("BP") and Halliburton Energy Services, Inc. ("Halliburton") (all defendants collectively as "Defendants"), and would respectfully show the Court that:

I.

Jurisdiction

1. This claim is maintained under the Jones Act (46 U.S.C. §§ 30104, *et seq.*) and/or the general maritime law of the United States. The Court has jurisdiction under the "saving to suitors" clause. 28 U.S.C. § 1333(1).

2. These claims are filed in state court pursuant to the "Saving to Suitors" clause. It is well-settled that Jones Act cases are not removable to federal court. 28 U.S.C. § 1445(a). This is true even when a Jones Act seaman sues his "borrowing employer." *Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 207 (5th Cir. 1993). This is also true even when a Jones Act claim is joined with claims which might otherwise be removable had no Jones Act

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claim been asserted (such as a purported OCSLA claim). *McInnis v. Parker Drilling Co.*, 2002 WL 461660 at *4 (E.D.La. March 21, 2001) ("Thus, assuming that plaintiff's petition states a claim under both the Jones Act and under OCSLA, the two are not separate and independent and, therefore, the case cannot be removed under § 1441(c)."); *Rybolt v. Laborde Marine Lift*, 2001 WL 263119 at *2 (E.D.La. March 14, 2001) (remanding case brought by seaman against OCSLA defendant and a Jones Act employer because "Plaintiff chose to bring his Jones Act claims in state court and his related claims [against the OCSLA defendant] are not removable under § 1441(c)."); *See also Lockhart v. Applied Coating Services, Inc.*, 2005 WL 157420 at *5 (E.D.La. June 24, 2005) (remanding case where the plaintiff alleged he was a Jones Act seaman and alternatively pleaded that OCSLA applied).

3. Moreover, OCSLA does not provide a basis for removal to federal court since the incident made the basis of this suit involved a floating vessel, not a fixed platform. Even if OCSLA did somehow apply (which Plaintiff denies), it still would not provide a basis for removal because several defendants are citizens of Delaware. *St. Joe Co. v. Transocean Offshore Deepwater Drilling Inc.*, 2011 WL 915300 at *11-14 (D.Del. March 15, 2011) (holding that OCSLA does not provide a basis for removing *Deepwater Horizon* cases to federal court when the plaintiff sues a forum defendant) (attached as Exhibit A).

4. Further, all defendants are Delaware citizens. As such, this case cannot be removed on the basis of diversity jurisdiction.

5. Plaintiff hereby gives notice that he will seek ***sanctions*** against any Defendant who removes this case.

II.

Parties

6. Plaintiff Stephen Bertone is a citizen of Mississippi.

7. Defendant BP Exploration & Production Inc. is a Delaware corporation with its principal place of business in Texas. BP Corporation North America, Inc. may be served with process through its registered agent, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801.

8. Defendant Halliburton Energy Services, Inc. is a Delaware corporation with its principal place of business in Texas. Halliburton Energy Services, Inc. may be served with process through its registered agent, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801.

III.

Nature of the Action

9. Plaintiff suffered severe injuries as a result of the DEEPWATER HORIZON explosion on April 20, 2010. At the time, Plaintiff was a Jones Act seaman who was assigned to the DEEPWATER HORIZON as an engineer. The DEEPWATER HORIZON is a vessel. Plaintiff contributed to the function of the vessel and contributed to the accomplishment of the vessel's mission. He did this by working in the engine room and keeping the ship running. In short, he performed the ship's work. He spent far more than 30% of his employment time aboard the DEEPWATER HORIZON. The explosion and all the actions that led to the explosion occurred on navigable waters in the Gulf of Mexico. Moreover, the explosion disrupted maritime commerce such as commercial fishing, shipping,

and oil and gas exploration in the Gulf of Mexico. It obviously also had the potential to disrupt maritime commerce. Since this incident also bears a substantial relationship to maritime commerce, Plaintiff's claims against BP and Halliburton are governed by the general maritime law. Plaintiff's claims against BP are also governed by the Jones Act since he is BP's borrowed seaman/servant. BP controlled Plaintiff's work activity and directed him in the details of his work. Moreover, BP provided the place for performance of Plaintiff's work. BP also was ultimately responsible for the payment of Plaintiff's wages. BP also had the right to "run off" Plaintiff and/or terminate his employment of the Macondo 252 project.

10. While the DEEPWATER HORIZON was deployed on navigable waters, and while Plaintiff was contributing to and aiding such vessel to accomplish its mission, Plaintiff was critically injured, both physically and mentally, as a result of the explosion.

11. The DEEPWATER HORIZON was a floating semi-submersible drilling rig owned by Transocean. It was built in 2001, utilized dynamic positioning technology, and was designed to move from location to location as necessary. BP leased the drilling rig from Transocean for $500,000 per day. The total lease contract was worth more than $544 million. Prior to the April 20th explosion, the DEEPWATER HORIZON had suffered other fires, collisions, and oil spills.

12. As a result of the tragedy, U.S. Attorney General Eric Holder is considering bringing criminal charges against BP and the rig supervisors employed by BP. This would not be the first time BP has faced criminal charges in relation to its activities in and around the Gulf of Mexico. In 2007, BP pled guilty to felony charges arising out of the March 2005

explosion at its Texas City refinery which killed 15 workers and injured hundreds more. After that explosion, BP was fined more than $21 million by OSHA – the largest penalty ever issued at that time. BP was also required to fix the deficiencies which led to the Texas City disaster. However, BP refused to comply with its obligations and failed to make the required safety upgrades. As a result, in 2009, BP was fined an additional $87 million by OSHA – by far the largest fine in OSHA history. BP's reckless safety culture is systemic.

13. Halliburton was in charge of cementing the well, but failed to safely do its job. Halliburton knew or, based on its experience in the industry, should have known that poor cementing significantly increases the risk of a blowout. Halliburton's cementing job should have filled the annulus between the casing and the well bore and sealed off the hydrocarbon-filled formations. It also should have plugged the bottom of the casing pipe to prevent an influx. However, the cement slurry Halliburton designed and created on this job failed to perform these functions. Halliburton's light nitrified foam cement slurry failed in its function and allowed hydrocarbons to enter the wellbore annulus. The cement design and testing was improper and fell far below the standard of care. In fact, the slurry failed multiple stability tests prior to the blowout. Halliburton ignored these failed tests. Halliburton's account representative/engineer on the rig knew about these problems and complained that there was a "high probability" of explosive gas flowing through the cement unless changes were made. Further, the Macondo well was located in brittle, variable rock formations laced with volatile high temperature, high pressure, and gaseous hydrocarbon reserves. Given this environment, Halliburton's improper cement mixture was a recipe for disaster. This conduct was willful, wanton, reckless and grossly negligent. Halliburton was

aware of this conduct, authorized it, and ratified it. Moreover, BP complained that Halliburton's account representative/engineer was not competent to perform his cement-related job responsibilities. Halliburton had a duty to adequately train and supervise him, but failed to do so. Moreover, Halliburton was charged with real time gas monitoring, but failed to notice the dangerous pressure readings (or noticed, but failed to inform anyone or take any action). Had Halliburton safely performed this function, the factors leading to the blowout would have been detected in time to take proper preventative actions. Halliburton's faulty cementing work has been linked to other major offshore disasters, including nearly half of all Gulf of Mexico blowouts since 1992. Halliburton's cementing work also caused a massive blowout in August 2009 on another rig off the coast of Australia.

14. BP was in charge of the vessel's operations. BP controlled the details and methods that work on the vessel was conducted. BP was aware of negative pressure test results which showed that it was too dangerous to continue operations and that a blowout was imminent. BP ignored the test results and ordered operations to continue since BP was behind schedule and did not want further delays. BP also was aware of Halliburton's inadequate cementing job, but used the dangerous cement anyway in order to avoid further delay and expense.

15. All Defendants are negligent, negligent per se, grossly negligent, and reckless for the following reasons:

a. failure to properly supervise their crew;

b. failure to properly train their employees;

c. failure to provide adequate safety equipment;

d. failure to provide adequate medical treatment;

e. operating the vessel with an inadequate crew;

f. failure to maintain the vessel;

g. failure to conduct a proper maritime search and rescue mission;

h. vicariously liable for their employees' and agents' negligence, negligence per se, gross negligence, and recklessness;

i. violating applicable Coast Guard, MMS, and/or OSHA regulations;

j. failure to provide plaintiff with a safe place to work, and requiring plaintiff to work in unsafe conditions;

k. failure to provide sufficient personnel to perform operations aboard the vessel;

l. failure to exercise due care and caution;

m. failure to avoid this incident; and

n. other acts deemed negligent.

16. At all relevant times, the DEEPWATER HORIZON was unseaworthy.

17. As a result of said occurrences, Plaintiff sustained severe injuries to his body which resulted in physical pain, suffering, mental anguish, fear, and discomfort. Plaintiff continues to suffer following his injuries. He is owed maintenance and cure for the past and the future. To the extent BP (or any other Jones Act employer) has refused and will refuse to pay maintenance and cure, such refusal is willful, intentional, arbitrary, and capricious, entitling Plaintiff to an award of attorneys' fees and punitive damages.

18. As a result of said occurrences, Plaintiff sustained the following damages:

a. Past, present, and future physical pain and suffering;

b. Past, present, and future mental pain, suffering, and anguish;

c. Past, present, and future medical expenses;

d. Past lost wages and earning capacity;

e. Loss of future wages and earning capacity;

f. Loss of fringe benefits;

g. Disfigurement and/or disability;

h. Loss of enjoyment of life; and

j. All other damages recoverable under law.

19. Plaintiff is also entitled to punitive damages because the aforementioned actions of Defendants were grossly negligent and reckless. Defendants' conduct was willful, wanton, arbitrary, and capricious. They acted with flagrant and malicious disregard of Plaintiff's health and safety and the health and safety of Plaintiff's co-workers. Defendants were subjectively aware of the extreme risk posed by the conditions which caused Plaintiff's injuries, but did nothing to rectify them. Instead, Defendants had Plaintiff and other crew members continue working despite the dangerous conditions that were posed to them and the faulty, defective equipment provided to them. Defendants did so knowing that the conditions posed dangerous and grave safety concerns. Defendants' acts and omissions involved an extreme degree of risk considering the probability and magnitude of potential harm to Plaintiff and others. Defendants had actual, subjective awareness of the risk, and consciously disregarded such risk by allowing Plaintiff to work under such dangerous conditions. The conduct Plaintiff complains of was authorized and ratified by Defendants. Moreover, Plaintiff may recover punitive damages under the general maritime law following the United States Supreme Court's ruling in *Atlantic Sounding* and *Exxon Shipping Company*.

IV.

Jury Trial

20. Plaintiff hereby requests a trial by jury on all claims.

V.

Prayer

WHEREFORE, Plaintiff demands judgment against Defendants, both jointly and severally, for compensatory damages, general damages, special damages, pre-judgment and post-judgment interest, attorneys' fees, punitive damages, the costs of this action together with any other relief this Court deems just.

MacELREE HARVEY, LTD.

By: Christopher J. Curtin

Christopher J. Curtin, Esquire
DE Bar ID. No. 0226
Attorney for Plaintiffs
5721 Kennett Pike
Centerville, DE 19807
Phone: (302) 654-4454
Facsimile: (302) 654-4954
E-mail: ccurtin@macelree.com

Date: April 20, 2011

Arnold & Itkin, LLP

/s/ Kurt B. Arnold

Kurt B. Arnold
TX Bar ID. No. 24036150
Pro Hac Vice admission pending
Jason A. Itkin
TX Bar ID. No. 24032461
Pro Hac Vice admission pending
Cory D. Itkin
TX Bar ID. No. 24050808
Pro Hac Vice admission pending
1401 McKinney Street, Suite 2550

Houston, TX 77010
Phone: (713) 222-3800
Facsimile: (713) 222-3850
E-mail: karnold@arnolditkin.com
jitkin@arnolditkin.com
citkin@arnolditkin.com

Date: April 20, 2011

Attorneys for Plaintiff

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE ST. JOE COMPANY, Plaintiff, v. TRANSOCEAN OFFSHORE DEEPWATER DRILLING INC., TRANSOCEAN HOLDINGS LLC, TRANSOCEAN DEEPWATER INC., and TRITON ASSET LEASING GMBH, Defendant.	:	C.A. No. 1:10-cv-968-LPS

Edmond D. Johnson, Esquire, James G. McMillan, Esquire, and James H. S. Levine, Esquire of Pepper Hamilton LLP, Wilmington, DE
William A. Brewer III, Esquire, Michael J. Collins, Esquire, Kenneth N. Hickox, Jr., Esquire, Robert W. Gifford, Esquire, and James S. Renard, Esquire, of Bickel & Brewer, Dallas, TX

Counsel for Plaintiff.

Andre G. Bouchard, Esquire, and Jeffery M. Gorris, Esquire, of Bouchard Margules & Friedlander, P.A., Wilmington, DE
Champbell E. Wallace, Esquire of Frilot LLC, New Orleans, LA

Counsel for Defendants.

MEMORANDUM OPINION

March 15, 2011
Wilmington, Delaware.

entitled *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, pending in the Eastern District of Louisiana ("the MDL Court"). The Halliburton and M-I actions have been assigned to the MDL Court pursuant to a Transfer Order issued by the Joint Panel on Multidistrict Litigation ("JPML") on February 7, 2011.[1]

On November 30, 2010, the JPML issued Conditional Transfer Order No. 7 ("CTO 7"), which conditionally transferred the instant action to MDL 2179 as well. On December 21, 2010, St. Joe filed with the JPML a motion to vacate CTO 7.

In the meantime, on November 18, 2010, Transocean filed a motion to stay the instant action pending the JPML's transfer ruling. (D.I. 3) St. Joe opposed a stay and, in turn, filed a motion to remand on December 2, 2010. (D.I. 5; D.I. 8) On January 6, 2011, Transocean requested oral argument on its motion to stay and St. Joe's motion to remand. (D.I. 13) On the same day, St. Joe requested oral argument on the motion to remand. (D.I. 14) On January 18, 2011, the Court issued an Order scheduling oral argument on the motion to remand for February 10, 2011. (D.I. 15) On February 4, 2011, the Court amended its Order and advised the parties that oral argument would be heard on both the remand and stay motions. (D.I. 18)

After the JPML denied St. Joe's motion to vacate CTO 5 on February 7, 2011, Transocean filed an emergency Motion for Continuance of the Hearing Scheduled for February 10, 2011. (D.I. 20) The Court heard the parties by teleconference on Transocean's emergency motion on February 8, 2011. Finding that granting the motion for continuance would be tantamount to granting the motion to stay, and recognizing that the parties (as well as the Court)

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[1]These two actions were conditionally transferred to the MDL Action on October 27, 2010, pursuant to Conditional Transfer Order No. 5 ("CTO 5"). St. Joe's motion to vacate CTO 5 was filed on November 17, 2010 and denied on February 7, 2011.

2.1(d).

IV. DISCUSSION

A. Motion to Stay

The Court first addresses Transocean's motion for a stay. By its motion, Transocean asks the Court not to decide the issues placed before it as a result of Transocean's decision to remove St. Joe's lawsuit from Delaware Superior Court to this Court. Instead, Transocean argues that this Court should exercise its discretion to stay this action and allow the JPML to decide whether this action should be transferred into the MDL Action. If, as all parties assume, the JPML does transfer this action, St. Joe will be able to renew its motion to remand in the MDL Action, where it would be decided by the Honorable Carl J. Barbier of the Eastern District of Louisiana, who is presiding over MDL 2179.

St. Joe opposes a stay. In St. Joe's view, there is no federal jurisdiction to hear this action, a fact that would be as true in the Eastern District of Louisiana as it is in this Court. A stay would prejudice St. Joe by causing further delay in resolution of its motion to remand, requiring St. Joe to continue to litigate in a federal forum, which lacks jurisdiction and which is not the forum in which St. Joe chose to bring its action. St. Joe believes it will take far longer for Judge Barbier to rule on its motion to remand than it will take this Court, given that in this Court the motion is already fully briefed, argued, and submitted for decision.

In determining whether to grant a stay, the Court typically considers three factors: the potential prejudice to the non-moving party, any hardship and inequity to the moving party in the absence of a stay, and judicial economy. *See Enhanced Sec. Research, LLC v. Cisco Sys., Inc.*, 2010 WL 2573925, at *3 (D. Del. June 25, 2010). Here, the Court has determined that two of

litigate issues arising from the BP oil spill in two courts – here (or the Delaware Superior Court) and the Eastern District of Louisiana, since Transocean is already a part of the MDL Action. This prejudice, however, results from actions brought by other plaintiffs – not St. Joe. Hence, this prejudice is attributable to Transocean's alleged role in the events relating to the oil spill, not to St. Joe's action or this Court's decision.

Transocean next points to the risk of inconsistent decisions: this Court might decide the remand motion differently than Judge Barbier will decide the same or similar motions as part of the MDL Action. There is, no doubt, some risk of inconsistency. Some of the issues presented by St. Joe's motion to remand are difficult and some are novel; it is also true that many of the relevant precedents are opinions issued by the Fifth Circuit, which will be binding on Judge Barbier but are not binding on this Court. The risk of inconsistent decisions, and the harm to Transocean that would result from them, are not, however, so great as to warrant a stay. Moreover, the risk of inconsistency is reduced here because this Court will treat the Fifth Circuit opinions as highly persuasive authority.

Transcoean also raises concerns that if this action proceeds in Delaware Superior Court, Transocean will be unable to defend itself adequately, because it will have difficulty bringing third parties into the state court action, given that cases against these third parties are pending in the MDL Action. Because St. Joe seeks to impose joint and several liability, Transocean fears that it will be severely prejudiced if it cannot recover against joint tortfeasors. St. Joe has represented that it will cooperate in efforts by Transocean to address these concerns in the Superior Court. (Tr. 10-11) Additionally, the Court is confident that the judge to whom this case is assigned in Superior Court will be able to manage the state court proceedings in a manner that

B. Motion to Remand

1. Removal Jurisdiction Pursuant to OPA

In its notice of removal, Transocean alleges that "this Court has federal question jurisdiction under the Oil Pollution Act ['OPA'] over claims alleged in the Complaint." (D.I. 1 at ¶ 6) But in the Complaint, St. Joe only raises claims based on Florida state law. Consequently, Transocean asserts that "OPA displaces claims pleaded by Plaintiff that seek recovery of damages that are recoverable exclusively under the OPA." (*Id.* at ¶ 7) St. Joe responds that, in making this assertion, Transocean raises a preemption defense; i.e., that OPA preempts the Florida tort claims which St. Joe actually asserts. (D.I. 6 at 6) Based on the well-pleaded complaint rule, St. Joe argues, a preemption defense cannot be the basis for removal. (*Id.* at 6-7) St. Joe further contends that OPA, through its state law saving clauses, explicitly avoids preempting state law claims for oil spill damages. (*Id.* at 9)

In its briefing, Transocean never directly addresses whether it raises a preemption defense. Instead, Transocean argues that, pursuant to Supreme Court precedent, St. Joe's claims invoke admiralty (or maritime) law, not Florida tort law. (D.I. 11 at 4) It is impossible to raise both state and admiralty claims, Transocean contends, because admiralty jurisdiction ousts state law. (*Id.*) Completing the argument, Transocean asserts that admiralty claims – which are federal common law claims – were displaced by OPA – the exclusive federal remedy for the types of damages alleged – and, therefore, St. Joe's claims are only cognizable under OPA (D.I. 11 at 9)

The Court must remand this case if "at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447©). "The statute is strictly

federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise . . . or that a federal defense the defendant may raise is not sufficient to defeat the claim." *Franchise Tax Bd. v. Constr. Laborers*, 463 U.S. 1, 10 (1983). No federal question is created by asserting that the state law on which a complaint is based has been preempted by federal law, i.e., a federal preemption defense. *See Beneficial Nat'l Bank*, 539 U.S. at 6 ("[A] defense that relies on . . . the pre-emptive effect of a federal statute . . . will not provide a basis for removal."). It is "settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar*, 482 U.S. at 393.

There is an exception to this rule known as the "complete preemption doctrine." In some situations, "the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. . . . Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.*

Despite Transocean's refusal to explicitly say so, its argument for federal question jurisdiction is premised on a preemption defense: that OPA preempts St. Joe's claims (either by directly preempting state tort claims or because admiralty law preempts state common law claims, and OPA, in turn, preempts admiralty claims). The well-pleaded complaint rule prohibits finding removal jurisdiction on this basis. Only if OPA "completely preempts" state tort claims

> (1) to impose additional liability or additional requirements; or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;
>
> relating to the discharge, or substantial threat of a discharge, of oil.

Accordingly, St. Joe argues the case law is clear that "state law remedies for oil spill damages are not displaced by admiralty law" and courts "hold that OPA's explicit preservation of common law oil spill claims is confirmation that Congress did not intend for admiralty law to supplant such claims." (D.I. 12 at 5)

As shown above, OPA's § 2718(a)(1)(A) explicitly prevents preemption of state law liability for "***the discharge of oil or other pollution by oil***" (emphasis added), a proposition confirmed by the legislative history and judicial decisions. *See* S. Rep. No. 101-94 (1989), at *6 ("To date, Federal legislation has affirmed the rights of States to protect their own air, water, and land resources by permitting them to establish State standards which are more restrictive than Federal standards. . . . This legislation, as reported by the Committee, would permit such State laws to continue and would not preclude enactment of new State laws. The theory behind the Committee action is that the Federal statute is designed to provide basic protection for the environment and victims damaged by spills of oil. Any State wishing to impose a greater degree of protection for its own resources and citizens is entitled to do so. On the other hand, a State might feel adequately protected by the Federal statute and therefore choose not to enact additional State law. In any event, the Committee chose not to impose, arbitrarily, the constraints of the Federal regime on the States while at the same time preempting their rights to their own

("[S]ea-to-shore pollution – historically within the reach of the police power of the States – is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy."); *Illinois v. City of Milwaukee*, 731 F.2d 403, 411 n.3 (7th Cir. 1984).

At oral argument, Transocean further attempted to limit the scope of these saving clauses, arguing that the first – § 2718(a)(1) – applies only to state statutory regimes, while the second – § 2718(a)(2) – is limited to State law (including common law) relating to waste disposal.[4] (Tr. 44-46) The Court disagrees. The first clause preserves "the authority of any State or political subdivision thereof" to impose "any additional liability or requirements with respect to" "the discharge of oil or other pollution by oil within such state; or . . . any removal activities in connection with such discharge." 33 U.S.C. § 2718(a)(1). This clause draws no distinction between a State exercising this authority via state common law or a state statutory regime. *See Williams v. Potomac Elec. Power Co.*, 115 F. Supp. 2d 561, 565 (D. Md. 2000) ("OPA does not preempt state laws of a scope similar to the matters contained in Title I of OPA, such as the state common law actions pleaded here [negligence, trespass, strict liability, and nuisance].") (internal citations omitted). The second clause provides in pertinent part: "[n]othing in this Act . . . shall . . . affect or be construed to affect or modify in any way obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law." 33 U.S.C. § 2718(a)(2). This provision, therefore, makes clear that, in addition to the preservation of state authority to impose liability above and beyond OPA, any liability existing

[4]Transocean raised these arguments for the first time at oral argument. They appeared nowhere in Transocean's Opposition Brief. (*See* D.I. 11)

St. Joe's alleged shoreside damages. (*Id.* at 6)

St. Joe does not contest that, under the facts at hand, admiralty jurisdiction would be proper, i.e., the *Grubart* test is satisfied. St. Joe also recognizes that the Admiralty Extension Act extends maritime jurisdiction to cover sea-to-shore transactions. (*See* Tr. 21) St. Joe argues, however, that pre-OPA, the Admiralty Extension Act did not preclude concurrent state law claims for sea-to-shore pollution; OPA has since trumped the Admiralty Extension Act with regards to oil pollution liability; and OPA explicitly allows concurrent state law claims regarding liability. (D.I. 6 at 7-9; Tr. 21-22)[6]

The Court agrees with St. Joe. In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 328 (1973), a pre-OPA opinion, the Supreme Court held that a Florida statutory scheme regarding oil spill damages was not preempted by federal law. The Court explained:

> One can read the history of the Admiralty Extension Act without finding any clear indication that Congress intended that sea-to-shore injuries be exclusively triable in the federal courts. . . .
>
> [S]ea-to-shore pollution – historically within the reach of the police power of the States – is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy. . . .
>
> . . . . But we decline to . . . oust state law from any situation involving shoreside injuries by ships on navigable waters. The Admiralty Extension Act does not pre-empt state law in those situations.

Id. at 341-44. *Askew* makes clear that, prior to OPA, state law was applicable to sea-to-shore

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[6]St. Joe also maintains that removal is improper even if its claims sound in admiralty law because admiralty claims may not be removed from state court. (D.I. 12 at 4)

motion to dismiss, not in opposition to a motion to remand.[10]

In sum, the Court finds that Transocean raises a federal preemption defense as its basis for removal jurisdiction, regardless of how Transocean characterizes the argument. The well-pleaded complaint rule precludes basing removal jurisdiction on this defense. Even if the Court reaches the merits of the preemption argument, the Court finds it unpersuasive. OPA, through its saving clauses, preserves the state law claims which St. Joe asserts, and such claims were recognized prior to OPA. Thus, the Court rejects Transocean's contention that it has federal question jurisdiction under OPA.

2. Removal Jurisdiction Pursuant To OCSLA

In the alternative, Transocean argues that removal jurisdiction is appropriately based on the Outer Continental Shelf Lands Act, known as "OCSLA." 43 U.S.C. § 1331 et seq. The Court disagrees.

As an initial matter, there is substantial tension between Transocean's argument for removal jurisdiction pursuant to OPA and its argument under OCSLA. In making its OPA-based argument, Transocean emphasizes that OPA "provides a comprehensive statutory framework" for oil spill injuries, "represents Congress' attempt to provide a comprehensive framework in the area of maritime oil pollution," and is the "sole federal law applicable in this area of maritime

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actions pursuant to various sections of the Rivers & Harbors Appropriation Act of 1899 and rights of action under Louisiana law." 752 F.2d at 1021.

[10]In fact, the very same argument Transocean presses here is also the subject of a motion to dismiss which Transocean recently filed in the MDL Action. (D.I. 29 Ex. 2) Although a single footnote appearing in the motion to dismiss characterizes the argument as based on choice of law principles, the body of Transocean's dismissal brief repeatedly refers to it as a preemption argument. (*Id.*)

'artfully' omitting essential federal issues from a state court petition. . . . If the state causes of action alleged in the complaint are applicable to this case, it is only because state law has been adopted as surrogate federal law through OCSLA. Therefore, the fact that plaintiffs' state court petition failed to specifically invoke OCSLA does not defeat [defendant's] right under 28 U.S.C. § 1441(a) to remove this case to federal court."). The Court treats this as persuasive authority and, therefore, will turn to the substance of Transocean's OCSLA argument.

Transocean argues that federal jurisdiction exists, in its own right, from the grant of original jurisdiction to district courts in § 1349 of OCSLA for cases and controversies arising out of operations conducted on the Outer Continental Shelf. (D.I. 1 at ¶ 9) Alternatively, Transocean argues that removal is proper pursuant to 28 U.S.C. § 1331 federal question jurisdiction because St. Joe's claims arise under OCSLA.

St. Joe responds that OCSLA's grant of original jurisdiction creates no removal jurisdiction because OCSLA does not grant federal courts exclusive jurisdiction over claims arising on the Outer Continental Shelf. (D.I. 6 at 16-17) While the federal government has sovereignty on the Outer Continental Shelf, states still have the power to adjudicate claims arising from activities there; i.e., states have concurrent jurisdiction. (*Id.* at 17) Finally, St. Joe contends that OCSLA creates no federal question jurisdiction because courts require a separate basis for federal jurisdiction independent of OCSLA to allow for removal.

Section 1349(b)(1) of OCSLA grants district courts jurisdiction in controversies arising out of activity on the Outer Continental Shelf:

arise under federal law. But a finding of "arising under" jurisdiction was unnecessary in that case because no forum defendant was involved. The court avoided the "conundrum" of deciding whether "arising under" jurisdiction existed under OCSLA because "removal [wa]s consistent with the second sentence of § 1441(b), if not the first." *Id.* at 156.

A later Fifth Circuit case, *Hufnagel v. Omega Services Industries, Inc*, 182 F.3d 340, 351 (5th Cir. 1999), found federal question jurisdiction arising under OCSLA for a complaint based on Louisiana law because, under OCSLA's state-law borrowing provision, the Louisiana statute was the applicable federal law under which plaintiff's claims arose. The court found the plaintiff's claims were "nonmaritime ones 'arising under' and governed by OCSLA. Accordingly, the case [could] be removed without regard to the citizenship of the parties." *Id.* at 352. *Hufnagel* did not address whether "arising under" jurisdiction is present when both OCSLA and maritime jurisdiction exists.

Here, original jurisdiction exists under OCSLA. *See MDL Op.*, 2010 WL 3943451, at *3 ("[I]t is clear that original jurisdiction rests with this Court pursuant to § 1349(b)(1)."); *Phillips v. BP PLC*, 2010 WL 3257737, at *1 (N.D. Fla. Aug. 17, 2010) ("As a matter of plain English, § 1349(b)(1) provides federal jurisdiction over the plaintiff's claim, because the claim arises out of, and is connected with, the *Deepwater Horizon*'s oil-related operations on the continental shelf."). St. Joe admits the facts necessary to find OCSLA jurisdiction; there is no real dispute on this issue. St. Joe emphasizes, however, that to the extent the Court construes its claims as maritime claims (even though St. Joe does not purport to be pressing maritime claims), these claims do not "arise under" federal law, and removal jurisdiction remains improper.

In the alternative, if St. Joe's claims are viewed as non-maritime, the analysis is more

agree that the pertinent federal law is OPA, not Florida law nor the law of the adjacent state (presumably Louisiana). Therefore, unlike the situation in *Hufnagel*, there is no basis here for reading St. Joe's complaint as raising OCSLA claims. St. Joe's causes of action do not "arise under" OCSLA for purposes of removal.[11]

Having decided there is no "arising under" jurisdiction, the Court must decide whether the second sentence of 28 U.S.C. § 1441(b), the so-called "forum defendant rule," applies. Section 1441(b) states (with emphasis added):

> Any civil action of which the district courts have original jurisdiction founded on a claim or right ***arising under*** the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. ***Any other such action*** shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Under the plain language of this statute, the second sentence applies here, since there is no "arising under" jurisdiction.

The parties are in agreement that no court has determined whether an action can be removed based on OCSLA's jurisdictional grant despite the presence of forum defendants. (*See, e.g.*, Tr. 50-51) That is, the applicability of the second sentence of § 1441(b) in OCSLA cases based on maritime law is an open question.[12] In at least two cases, the Fifth Circuit recognized

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[11]For this reason, *White v. Chevron*, 1990 WL 28167 (E.D. La. Mar. 14, 1990), is distinguishable also. *See id.* at *1 ("If the state causes of action alleged in the complaint are applicable to this case, it is only because state law has been adopted as surrogate federal law through OCSLA.").

[12]Judge Barbier appears to agree. *See MDL Op.*, 2010 WL 3943451, at *4 ("It is well settled that maritime law claims do not arise under the laws of the United States. . . . It is

may be counterintuitive. Yet, at the same time, the Fifth Circuit recognized that ***perhaps*** congressional intent under OCSLA would support removal despite the presence of a forum defendant, but the language of § 1441(b) does not.[13] Hence, the Court concludes that, even if it were bound to follow Fifth Circuit precedent, no Fifth Circuit authority compels the conclusion that the forum defendant rule does not apply here. Thus, again, the Court applies the plain and unambiguous language of § 1441(b), which, here, precludes removal to federal court due to the presence of a forum defendant.

Transocean argues that the forum defendant rule is inapplicable because it is limited to removal cases based on diversity jurisdiction. (D.I. 11 at 20) But this discounts the explicit language of the statute, and Transocean cites no authority for such a limitation.[14] The Court rejects Transocean's implicit invitation to ignore the clear statutory language of § 1441(b).

Accordingly, since three of the four Defendants in this action are citizens of Delaware, removal was improper under the second sentence of § 1441(b). *See Belcufine v. Aloe*, 112 F.3d 633, 637-38 (3d Cir. 1997) (resolving issue on other grounds, but noting that "[t]he . . .

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[13]In *Phillips v. BP PLC*, 2010 WL 3257737, at *1 (N.D. Fla. Aug. 17, 2010), the Northern District of Florida denied a motion to remand an action brought by a Florida plaintiff against BP for shoreside injuries following the BP oil spill, as the court found it had subject matter jurisdiction pursuant to OCSLA. The decision makes no mention of the citizenship of the parties nor the applicability of the forum defendant rule, therefore, leaving the issue raised in the present action unresolved. No party to this action contends that *Phillips* addressed the forum defendant issue.

[14]Transocean cites an excerpt from *In re 1994 Exxon Chemical Fire*, 558 F.3d 378, 391 (5th Cir. 2009), in which the Fifth Circuit stated that "removal based on diversity jurisdiction is permitted only if 'none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is bought.'" This is wholly consistent with the second sentence of § 1441(b), since an action in which jurisdiction is based on diversity is "[a]ny other such action." But this statement does not imply the forum defendant rule is thereby inapplicable to actions based on other grants of jurisdiction – those cases are also "[a]ny other such action."