Rockwell v. Air & Liquid Sys. Corp.

United States District Court for the Central District of California

September 9, 2021, Decided; September 9, 2021, Filed

CV 21-3963-GW-PLAx

Reporter
2021 U.S. Dist. LEXIS 209918 *

Dennis A. Rockwell, et al. v. Air and Liquid Systems Corporation, et al.

Core Terms

maritime law, damages, motion to dismiss, high seas, exposure, ***asbestos***, federal enclave doctrine, cause of action, non-pecuniary, personal jurisdiction, state law, federal enclaves, punitive damages, parties, waters, strict liability, wrongful death, Jones Act, valves, failure to state a claim, personal injury, Supplemental, allegations, declaration, territorial, consortium, passenger, pecuniary, limits, sea

Counsel: [*1] Attorneys Present for Plaintiffs: Andrew L. Seitz, Paul C. Cook.

Attorneys Present for Defendants: Richard R. Ames, Glen R. Powell, Andrew S. Russell, Angela V. Sayre.

Judges: GEORGE H. WU, UNITED STATES DISTRICT JUDGE.

Opinion by: GEORGE H. WU

Opinion

CIVIL MINUTES - GENERAL

PROCEEDINGS: TELEPHONIC HEARING ON DEFENDANT WARREN PUMPS, LLC'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, OR IN THE ALTERNATIVE, FAILURE TO STATE A CLAIM [80]; DEFENDANT AIR & LIQUID SYSTEMS CORPORATION'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, OR IN THE ALTERNATIVE, FAILURE TO STATE A CLAIM [135]; and DEFENDANT AKRON BRASS COMPANY'S MOTION TO DISMISS FOR LACK OF JURISDICTION [238]

The Court's Tentative Further Ruling is circulated and attached hereto. Court hears oral argument. For reasons stated on the record, the Motions are taken under submission.

Tentative Further Rulings on Defendants Akron Brass Company, Warren Pumps, LLC and Air & Liquid Systems Corporation's Motions to Dismiss

I. Background

The factual background of this action has already been extensively discussed in a previous order and should be familiar to the parties. *See* Court's Tentative Ruling on Defendants' Motion to Dismiss ("Tentative") at **[*2]** 1-2, ECF No. 293. In short, Plaintiffs Dennis A. Rockwell and his wife, Dawn Rockwell, brought this action against over sixty Defendants for alleged ***asbestos***-related lung injuries suffered by Dennis Rockwell ("Rockwell") due to inhalation of ***asbestos*** fibers while working on two Navy ships over navigable waters and during his employment at Camp Pendleton. Defendants are entities that were allegedly involved in the business of manufacturing, distributing, and selling ***asbestos*** or ***asbestos***-containing products, which eventually arrived at one of Rockwell's worksites. The ***asbestos*** exposure ultimately resulted in Rockwell's February 2021 diagnosis of mesothelioma — a cumulative, progressive, and incurable lung disease. *See* First Amended Complaint ("FAC") ¶¶ 1-7, Exh. B, ECF No. 8.

In its Tentative, the Court provisionally held that: (1) derivative sovereign immunity under *Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 60 S. Ct. 413, 84 L. Ed. 554 (1940)*, could operate as a jurisdictional bar and ordered jurisdictional discovery to see if Defendants Warren Pumps, LLC and Air & Liquid Systems Corporation (collectively "Defendants") were entitled to mount a *Yearsley* defense, *see* Tentative at 4-7; (2) the federal enclave doctrine applied to claims that accrued

in Camp Pendleton and **[*3]** would bar Plaintiffs' strict products liability claims, which were recognized in California only in 1963, nearly twenty years after Camp Pendleton became a federal enclave in 1942, *see* Tentative at 7-8; (3) general maritime law would not appear to recognize claims for loss of consortium in the particular circumstances of this case, *see* Tentative at 9; and (4) general maritime law would not appear to provide for punitive damages claims as to the Defendants, *see* Tentative at 9-12. The Court concluded that the initial papers were briefing were insufficient and found several open questions with respect to the federal enclave doctrine and whether general maritime law recognized non-pecuniary damages in this context, so it requested supplemental briefing on those two issues. *See* Tentative at 12.

Before the Court are the supplemental briefs from certain parties addressing the two issues and a separately filed motion to dismiss from Defendant Akron Brass Company ("Akron Brass"). Plaintiffs have filed a Supplemental Opposition to Defendants' Motion to Dismiss for Failure to State a Claim ("Supp. Opp."), ECF No. 314. Defendants have filed a Supplemental Reply to Plaintiffs' Supplemental Opposition **[*4]** ("Supp. Reply)," ECF No. 320. This ruling also addresses Akron Brass's motion to dismiss. *See* Akron Brass's Motion to Dismiss ("Mot."), ECF No. 238. Plaintiffs have submitted an Opposition ("Opp"), ECF No. 267; and Akron Brass has provided a Reply, *see* ECF No. 316, and Plaintiffs have submitted a Supplemental Opposition ("Akron Supp."), ECF No. 323.

II. Legal Standard

A. *Rule 12(b)(2)*

Under *Rule 12(b)(2)*, a court must dismiss an action where it does not have personal jurisdiction over a defendant. *Fed. R. Civ. P. 12(b)(2)*. While the burden is on the plaintiff to demonstrate that the court has personal jurisdiction, "the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1127 (9th Cir. 2010)* (citation omitted). Regarding the standard for challenges of fact, the court must accept *uncontroverted* allegations in the plaintiff's complaint as true and resolve all disputed facts in favor of the plaintiff. *Id.*

Traditional bases for conferring a court with personal jurisdiction include a defendant's consent to jurisdiction, personal service of the defendant within the forum state, or a defendant's citizenship or domicile in the forum state. *J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 879-80, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011)*. There are two types of personal jurisdiction, "general" and "specific," **[*5]** and for the court to exercise the latter over a defendant, "the suit must arise out of or relate to the defendant's contacts with the forum." *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, 137 S. Ct. 1773, 1779-80, 198 L. Ed. 2d 395 (2017)*. Absent one of the traditional bases for jurisdiction, the *Due Process Clause* requires that the defendant have "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Wash., 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*.

B. *Rule 12(b)(6)*

Under *Rule 12(b)(6)*, a defendant may move to dismiss for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *see also Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)*.

The court must construe the complaint in the light most favorable to the plaintiff, by accepting all allegations of material fact as true, and drawing all reasonable inferences from well-pleaded factual allegations in favor of the plaintiff. *Gompper v. VISX, Inc., 298 F.3d 893, 896 (9th Cir. 2002)*. The court is not required to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. While a complaint does not need detailed factual allegations to survive a *Rule 12(b)(6)* motion, the plaintiff must provide grounds demonstrating its entitlement to relief. *Twombly, 550 U.S. at 555*. Under **[*6]** the Supreme Court's decisions in *Twombly* and *Iqbal*, this requires that the complaint contains "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*).

III. Discussion

A. Supplemental Briefing Regarding Federal Enclave

Doctrine and Punitive Damages

Plaintiffs argue that the Court erred in dismissing their fifth cause of action for strict liability under the federal enclave doctrine and in dismissing their claims for non-pecuinary damages under general maritime law.[1] With respect to the federal enclave doctrine, Plaintiffs cite to *28 U.S.C. § 5001*, formerly *16 U.S.C. § 457*, which provides for the application of state law in civil actions involving death or personal injury in federal enclaves. *See* Supp. Opp. at 5-6. On the issue of non-pecuniary damages, Plaintiffs point to the Court's previous decision in *Dennis v. Air & Liquid Sys. Corp.*, Case No. 2:19-cv-09343-GW-(KSx), ECF No. 311 ("*Dennis*"), which allowed claims for loss of consortium and punitive damages in a case involving ***asbestos*** exposure in navigable and territorial waters, and requests that the same conclusion be reached here. *See* Supp. Opp. at 4-5, 7-8. In return, Defendants argue that maritime law should be applied to **[*7]** the entire action, including the claims involving Camp Pendleton. *See* Supp. Reply at 5-6. And even if martime law does not apply, Defendants contend that the federal enclave doctrine bars claims for strict products liability. *See id.* at 6-7. Defendants also support the dismissal of claims seeking non-pecuniary damages under general maritime law. *See id.* at 7-8.

First, with respect to applicable law, the Court does not agree that Plaintiffs' negligence and strict liability causes of action under California law are duplicative. Plaintiffs allege injury by exposure to ***asbestos*** during Rockwell's tenure on Navy ships from 1962 to 1965, which the parties agree falls under general maritime law. Plaintiffs also allege a possible separate injury by exposure to ***asbestos*** during Rockwell's tenure at Camp Pendleton (a federal enclave) from 1966 to 2000, which requires application of the federal enclave doctrine. Upon investigation, the facts could reflect that the majority of the relevant ***asbestos*** exposure occurred during Rockwell's time on Navy ships or the opposite, that Rockwell was only exposed during his time at Camp Pendleton. The Court sees no reason to adopt one set of laws for both **[*8]** situations. The case cited by Defendants appears to agree. *See Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455, 459 (E.D. Pa. 2011)* ("By contrast, maritime law does not govern when the ***asbestos*** claims asserted stem from predominantly land-based Navy work even if the allegedly defective product was produced for use on a vessel.").

Second, with respect to the federal enclave doctrine, the Court agrees with Plaintiffs that *28 U.S.C. § 5001*, formerly *16 U.S.C. § 457*, provides for the application of state law for an injury sustained in a place subject to the exclusive jurisdiction of the United States within a state, such as Camp Pendleton in California. "The Supreme Court has recognized at least three exceptions to the rule that only state law in effect at the time of cession applies within the federal enclave: 1) where Congress has, by statute, provided a different rule; 2) where the state explicitly retained the right to legislate over specific matters at the time of cession; and 3) where minor regulatory changes modify laws existing at the time of cession." *See Allison v. Boeing Laser Tech. Servs., 689 F.3d 1234, 1237 (10th Cir. 2012)*. Under the first exception, Congress acted to pass *28 U.S.C. § 5001*,[2] which provides for the application of state law for claims of wrongful death and personal injury where the death or injury occurred on a federal enclave. *See Allison, 689 F.3d. at 1237* ("Congress **[*9]** has also allowed the application of state law to a variety of civil claims in federal enclaves, such as wrongful death, *16 U.S.C. § 457*; workers' compensation, *40 U.S.C. § 3172*; unemployment compensation, *26 U.S.C. § 3305(d)*; and fish and game regulation, *10 U.S.C. § 2671*"). Defendants argue that *28 U.S.C. § 5001* does not expressly incorporate state strict liability laws, *see* Supp. Reply at 7, but Defendants fail to provide a persuasive argument why *Section 5001* would not include those rights of action. Based on a plain reading of the statute,

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[1] In its Tentative, the Court stated that "[t]he claims for punitive damages are also dismissed for the second and fourth causes of action for negligence and strict liability in torts under maritime law." *See* Tentative at 12. As was likely obvious to the parties, the Court made a drafting error as the first cause of action is for negligence under general maritime law, while the second cause of action is for negligence under California law. To clarify, the Court tentatively dismissed the claim for punitive damages for negligence under general maritime law, or in relation to the *first* cause of action.

[2] *28 U.S.C. § 5001* states that:

> (a) Death. In the case of the death of an individual by the neglect or wrongful act of another in a place subject to the exclusive jurisdiction **[*10]** of the United States within a State, a right of action shall exist as though the place were under the jurisdiction of the State in which the place is located.
>
> (b) Personal injury. In a civil action brought to recover on account of an injury sustained in a place described in *subsection (a)*, the rights of the parties shall be governed by the law of the State in which the place is located.

the Court finds that Section 5001 would be implicated in a civil action for recovery of a personal injury sustained in a federal enclave, like here, and California law would apply. *See* 28 U.S.C. § 5001(b) ("In a civil action brought to recover on account of an injury sustained in a place [subject to the exclusive jurisdiction of the United States within a State], the rights of the parties shall be governed by the law of the State in which the place is located."). Therefore, California state law applies to Plaintiffs' claim for strict liability for the exposure at Camp Pendleton, and the motion to dismiss that claim is denied.

Finally, with respect to the availability of non-pecuniary damages under general maritime law. The Court notes that its previous decision in *Dennis*, Case No. 2:19-cv-09343-GW-(KSx), ECF No. 311, is distinguishable because it did not involve only claims of injury on the high seas, like here, but also included claims of injury sustained on the territorial seas, or within the coastal waters within 12 miles from the coastline of a coastal state. *See Dennis*, ECF No. 311 at 6. There is a patchwork of statutory regimes and general maritime causes of action that need to be considered. First, the Jones Act, 46 U.S.C. § 30104, "establishes a cause of action for negligence for injuries or death suffered in the course of employment, but only for seamen." *See* Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 817, 121 S. Ct. 1927, 150 L. Ed. 2d 34 (2001). The Jones Act also limits the categories of defendants that can be targeted under that **[*11]** Act, although at least one decision by the Ninth Circuit has questioned that requirement in light of the Supreme Court's reasoning in Miles v. Apex Marine Corp., 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990). *See Davis v. Bender Shipbuilding & Repair Co., 27 F.3d 426, 430 (9th Cir. 1994)* ("Yet there is nothing in Miles' reasoning to suggest that the decision turned upon the identity of the defendant. Indeed, not all of the defendants in Miles were Jones Act employers."); *but see* 6 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 6:23 The Jones Act defendant (2020) ("A Jones Act lawsuit may be properly filed only against the seaman's employer."). While the Jones Act does not contain any explicit language limiting damages, the Supreme Court found that Congress must have intended to incorporate a pecuniary damages limitation in the Jones Act by incorporating portions of the Federal Employers Liability Act ("FELA"), which offered protection to railroad workers. *See* Miles, 498 U.S. at 32; Michigan Cent. R. Co. v. Vreeland, 227 U.S. 59, 69-71, 33 S. Ct. 192, 57 L. Ed. 417 (1913) (discussing how the FELA was based on Lord Campbell's Act, the first wrongful death statute, which was found to limit non-pecuniary damages).

Second, the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761 *et seq.*, creates a wrongful death action for negligence and unseaworthiness for a death that was caused on the high seas, or "beyond a marine league from the shore of any State." *See* Norfolk Shipbuilding, 532 U.S. at 817-18. Unlike the Jones Act, DOHSA does **[*12]** not place limits on what categories of persons may be defendants or limit the cause of action to the estates of seamen. Where DOHSA applies, it applies exclusively and preempts state wrongful death statutes as well as wrongful death actions for negligence or unseaworthiness under the general maritime law as recognized in Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970). *See* 6 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 8:2 The Death on the High Seas Act (2020). But the DOHSA does limit the type of damages that can be recovered. "DOHSA, by its terms, limits recoverable damage in suits of wrongful death on the high seas to '*pecuniary* loss sustained by the persons for whose benefit the suits is brought.'" Miles, 498 U.S. at 21.

Finally, the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 et seq., provides non-seaman maritime workers with no-fault workers' compensation claims against their employer and negligence claims against the vessel for injury or death. *See* Norfolk Shipbuilding, 532 U.S. at 818-19. The LHWCA is not implicated here as it explicitly excludes "a master or member of a crew of any vessel," or a seaman like Rockwell. *See* 33 U.S.C. § 902(3)(G). The LHWCA also expressly preserves all claims against third parties, *see* 33 U.S.C. § 901, including those arising under state law, so it would not preempt any claims against a third-party tortfeasor, as here. And after **[*13]** the decision in Miles, the Supreme Court preserved the application of state statutes to deaths caused within territorial waters, allowing for recovery of non-pecuniary damages. *See* Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 215-16, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996).

As part of the reasoning for allowing the loss of consortium cause of action in *Dennis*, this Court noted that loss of society damages had always been available for longshoreman or passengers injured or killed in state territorial waters, although they were precluded under DOHSA for seaman or passengers injured or killed on the high seas. *See Dennis*, ECF No. 311 at 38. And it relied on the same reasoning to allow punitive damages.

See id. at 43 ("Given the fact that Dennis's exposure to ***asbestos*** occurred in California's territorial waters in addition to international waters, the Court finds it proper to extend a recognized state law remedy (recovery for loss of society) to federal maritime law claims."). The circumstances are shifted here as Plaintiffs have only alleged exposure on the high seas in regards to the specifically involved Defendants herein.

Here, with Rockwell's exposure only occurring on the high seas, only DOHSA and the Jones Act *could* be implicated. The Jones Act, however, does not squarely apply **[*14]** because Rockwell's claims are not directed at his former employer. Similarly, DOHSA also does not apply because Rockwell is still alive, so his claims currently only involve personal injury caused on the high seas. Based on the instant situation, the Court sees two opposing lines of argument.

On one hand, with Rockwell's maritime exposure only occurring on the high seas, allowing the cause of action for loss of consortium appears to directly contravene the holding in *Chan v. Soc'y Expeditions, Inc., 39 F.3d 1398, 1408 (9th Cir. 1994)*. As in *Chan*, Plaintiffs are essentially arguing that the Court "should allow a claim for loss of society or consortium to the dependents of a passenger *injured* in an accident at sea even though such damages are denied the dependents of a passenger *killed* at sea," which "makes no sense." *Id.* (emphasis in original). If Rockwell dies from his exposure to ***asbestos*** on the high seas, there appears to be little dispute that DOHSA would apply, preempt all other state or general maritime wrongful death remedies, and preclude non-pecuniary damages. *See* 6 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 8:2 The Death on the High Seas Act (2020) ("Thus, a recovery under DOHSA, which limits remedy for wrongful death to pecuniary damages, **[*15]** may not be supplemented by state wrongful death laws allowing non-pecuniary damages."). *Chan* has not been overruled and still stands as mandatory authority binding this Court unless we find that *Chan* has been overturned or is "clearly irreconcilable" with an intervening decision by the Supreme Court. *See Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003)* (A district court is no longer bound by Circuit precedent if the Supreme Court issues an intervening decision that "undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable."). If *Chan* is still good law, however, this Court is bound to follow its guidance: the Court should not allow non-pecuniary damages for a passenger injured at sea if they would not be available for a person killed at sea.

On the other hand, at least one district court in our circuit has concluded that *Chan and Atl. Sounding Co. v. Townsend, 557 U.S. 404, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009)* are "clearly irreconcilable" en route to finding that punitive damages were allowed for a negligence claim that resulted in personal injury on the high seas. *See Hausman v. Holland Am. Line-USA, No. 13-CV-00937-BJR, 2015 U.S. Dist. LEXIS 177686, 2015 WL 10684573, at *4 (W.D. Wash. July 23, 2015)* ("The Court is persuaded that the Supreme Court's decision in *Atlantic Sounding* is "clearly irreconcilable" with the Circuit's decision in *Chan*."). And as we discussed in *Dennis*, this Court found **[*16]** that *Atlantic Sounding* cabins the reach of *Miles* to only stand for the proposition that there should be uniformity between a cause of action available under maritime law and its statutory analogue, if Congress enacted one. *See Dennis*, ECF No. 311 at 40.

Further, a review of the history of the negligence and strict liability causes of action in maritime law suggests that punitive damages are allowed. Both causes of action were developed in common law and allowed punitive damages before they were incorporated into general maritime law. There is nothing to suggest that the causes of action would lose their ability to seek punitive damages because of their incorporation into general maritime law. As the claims for negligence and strict liability were never aimed at Rockwell's employer, they were never under the umbrella of Jones Act, which limits pecuniary damages. And as Rockwell has not passed, the claims do not fall under DOHSA. While the traditional unseaworthiness claim discussed in *The Dutra Grp. v. Batterton, 139 S. Ct. 2275, 2285-86, 204 L. Ed. 2d 692 (2019)*, shares many similarities with the strict liability cause of action, the reasoning of *Dutra* focuses predominantly on the history of the unseaworthiness claim. A similar focus on the history of the negligence **[*17]** and the strict liability reveals a history of allowing pecuniary damages.

The Court asks the parties to be prepared to argue whether the reasoning in *Chan* is still controlling and stands as mandatory authority on the Court, or if *Chan* has been effectively overruled by the intervening decision in *Atlantic Sounding* or any other applicable case.

B. Akron Brass Company's Motion to Dismiss

Akron Brass moves to dismiss for lack of personal jurisdiction citing Plaintiffs' failure to provide facts

connecting it to California. *See* Mot. at 3-6. Plaintiffs concede that there is no general jurisdiction over Akron Brass, *see* Opp. at 3, but submit a declaration by Rockwell where he states that he "recalls working with Akron Brass strainers and valves, including associated ***asbestos***-containing gaskets and packing, while in the United States Navy and at Camp Pendleton." *See* Declaration by Dennis A. Rockwell ("Rockwell Decl.") ¶ 4. In response, Akron Brass accuses Rockwell of providing a "sham affidavit" that contradicts his prior deposition testimony.[3] It attacks Rockwell's statements that he "likely" worked with Akron Brass valves at Camp Pendleton as vague, speculative, conclusory, and insufficient to establish **[*18]** specific personal jurisdiction.

The Ninth Circuit uses a three-part test to analyze specific personal jurisdiction:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform **[*19]** some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.* it must be reasonable.

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004). The plaintiff bears the burden of proving the first two factors (*i.e.* "purposeful availment" and "arising out of"); and, if the plaintiff succeeds in doing so, the burden shifts to the defendant to show that the exercise of jurisdiction would be unreasonable. *See Burger King v. Rudzewicz, 471 U.S. 462, 477, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)*.

The Court finds that Plaintiffs have alleged sufficient specific facts to establish specific jurisdiction over Akron Brass at this juncture. Rockwell has provided a declaration where he states that he recalls working with Akron Brass strainer and valves at Camp Pendleton, including associated ***asbestos***-containing gaskets and packing. *See* Rockwell Decl. ¶ 4. The Court takes this as prima facie evidence that Akron Brass supplied Camp Pendleton with the strainers and valves that Rockwell was exposed to, which is sufficient at this juncture because Defendants **[*20]** have not actually contested Rockwell's declaration by denying that they provided strainers and valves for use at Camp Pendleton. *See generally* Declaration of Daniel Teixeira, ECF No. 238-5. Instead, Defendant improperly attempts to create a fact dispute regarding the clarity of Rockwell's memory or whether Rockwell actually worked with the Akron Brass products because Rockwell did not initially list Akron Brass on a list of equipment that he worked with but later added it. These disputes aimed at Rockwell's conduct or memory do not concern personal jurisdiction, which is properly focused on the nature of Defendant's contacts with the forum state, and should be reserved for later in the proceedings. Furthermore, Akron Brass overstates its argument by claiming that Rockwell "contradict[ed]" himself during his deposition. *See* Reply at 2-3. Rockwell maintains throughout that he was exposed to Akron Brass parts during his time at Camp Pendleton even if he had forgotten to include Akron Brass in his

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[3] As observed in *Friends of the Earth v. Sanderson Farms, Inc., 992 F.3d 939, 944 (9th Cir. 2021)*:

> On a summary judgment motion, the sham affidavit rule permits courts to set aside contradictory testimony, provided certain conditions are met. *Yeager v. Bowlin, 693 F.3d 1076, 1080 (9th Cir. 2012)*. The rule is "'applied with caution' because it is in tension with the principle that the court is not to make credibility determinations when granting or denying summary judgment." *Id.* (quoting *Van Asdale v. Int'l Game Tech., 577 F.3d 989, 998 (9th Cir. 2009)*).

In order to trigger the sham affidavit rule, the district court must make a factual determination that the contradiction is a sham, and the "inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit." *Yeager v. Bowlin, 693 F.3d 1076, 1080 (9th Cir. 2012)*. As delineated in *Van Asdale v. Int'l Game Tech., 577 F.3d 989, 998-99 (9th Cir. 2009)*:

> [W]e have fashioned two important limitations on a district court's discretion to invoke the sham affidavit rule. First, we have made clear that the rule "does not automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony," *Kennedy, 952 F.2d at 266-67*; rather, "the district court must make a factual determination that the contradiction was actually a 'sham.'" *Id. at 267*. Second, our cases have emphasized that the inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit.

initial list of identified products or could not remember how Akron Brass valves looked like. *See generally* July 22, 2021 and July 23, 2021 Depositions of Dennis Rockwell ("Rockwell Depo"), ECF **[*21]** No. 316-2. The Akron Brass motion to dismiss is denied.

IV. Conclusion

Based on the foregoing discussion, the Court **DENIES** the motion to dismiss by Akron Brass. The fifth cause of action for strict liability under California law via the federal enclave doctrine can continue. The Court asks the parties to be prepared to argue whether the reasoning in *Chan* is still controlling and serves as mandatory authority on the Court, or if *Chan* has been effectively overruled by the intervening decision in *Atlantic Sounding*.

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