UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

JOHN PAUL DEHART, JR.	***CIVIL ACTION NO. 6:09-0626**
VS.	***MAGISTRATE JUDGE HILL**
BP AMERICA, INC., ET AL.	***BY CONSENT OF THE PARTIES**

MEMORANDUM RULING

Pending before the Court is the defendants' Motion for Partial Summary Judgement. [rec. doc. 88]. By this Motion, the defendants, Crown Oilfield Services, Inc., BP America Production Company, Production Management Industries, LLC, Brand Scaffold Builders, Inc., Cenergy Corporation, El Mar Consulting, LLC and Eagle Consulting, LLC (collectively "the defendants"), seek summary judgment on the plaintiff's request to certify this matter as a class action. The plaintiff, John Paul DeHart, Jr. ("DeHart"), has filed opposition. [rec. docs. 93 and 94]. Oral argument on the Motion was held on November 10, 2010. Plaintiff has filed a Post-Hearing Memorandum on whether issue preclusion should apply in this case, to which the defendants filed a Reply, and plaintiff has filed a Response. [rec. docs. 96, 99 and 103].

For the reasons which follow, the defendants' Motion for Partial Summary Judgement [rec. doc. 88] is **granted**, and accordingly, the **plaintiff's request to certify** this matter as a **class action** is **denied.** The defendants' request for an injunction is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, John Paul DeHart, Jr., filed this purported class action lawsuit on January 23, 2009 in state court[1] on behalf of himself and allegedly similarly situated people claiming personal injury as a result of exposure to airborne radiation dust/t-norms, between February 15, 2007 and April 30, 2007, while engaged in a platform decommissioning project. On February 20, 2009, the defendants removed the case to the United States District Court for the Eastern District of Louisiana. The case was transferred to this court on April 16, 2009.[2]

The platform was located at South Timbalier Block 160, in the Gulf of Mexico, approximately thirty miles off the coast of Louisiana. A time-chartered liftboat, L/B DIXIE PATRIOT, which was supporting the platform decommissioning, was jacked up adjacent to the platform. DeHart and other workers engaged in the decommissioning resided aboard L/B DIXIE PATRIOT while the work was being performed to the platform to take it out of service. There were also two supply boats assisting in the operation.

In his Petition, DeHart asserts a class action, and expressly identifies causes of action for negligence of the defendants "under the Jones Act, general maritime law, the applicable Louisiana law and alternatively, for negligence under 33 U.S.C. § 905(b)"[3], unseaworthiness of the L/B DIXIE/PATRIOT, and for maintenance and cure. [rec. doc. 1-1, ¶ 8-12].

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[1]The Civil District Court for the Parish of Orleans.

[2]All parties consented to the Court's jurisdiction being exercised by the undersigned pursuant to 28 U.S.C. § 636(c). *See* rec. docs. 72 and 73.

[3]rec. doc. 1-1, at ¶ 10.

Another member of the same purported class, George Larry Myers ("Myers") had previously filed a purported class action lawsuit on December 20, 2007 in another state court[4] on behalf of himself and allegedly similarly situated people claiming personal injury as a result of exposure to airborne radiation dust/t-norms, between March 1, 2007 and April 30, 2007, while engaged in the same platform decommissioning project. On February 4, 2008, the defendants removed that case to this court. *Myers v. BP America, Inc.*, 6:08cv0168 (W.D. La.) ("the *Myers* case").

Following the issuance of a Report and Recommendation by the undersigned, to which plaintiff filed no objections, Judge Doherty denied plaintiff's request to certify the *Myers* case as a class action by Judgement dated July 29, 2009, concluding that the undersigned's Report and Recommendation was correct and, thereby, adopting the conclusions set forth therein. [rec. docs. 201 and 203]. Myers did not seek to appeal that Judgment.

The basis for this court's denial of class certification in the *Myers* case was the plaintiff's failure to satisfy the Rule 23(b)(3) predominance requirement "based on the proposed class members' shared common experience of radiation exposure" given "the myriad of uncommon disparate questions regarding causation" which "preclude[d] such a

[4]The 16th Judicial District Court.

finding." *See Myers*, rec. doc. 201, at pg. 14.[5] In so concluding, this court expressly rejected Myers' argument that the predominance requirement was satisfied because there were common liability issues as follows:

> Plaintiff attempts to satisfy the predominance requirement by arguing that there is a common liability issue, that is, the fault of the defendants. Plaintiff argues that the defendants' alleged negligence in failing to test for, or monitor, radiation levels at the worksite, and failing to warn or protect the workers from exposure to allegedly high levels of radiation predominate throughout the proposed class.
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> However, the Fifth Circuit refused to accept substantially the same argument in the *Exxon Mobil* case. The Fifth Circuit rejected that argument because it "does no more than prove that some common issues exist across the class." Thus, noting that, "[t]he predominance inquiry . . . is more rigorous than the commonality requirement", the Fifth Circuit found that because the cause of the fire and related liability issues were relatively straightforward, compared to the vastly more complex individual issues of medical causation and damages, it was not an abuse of discretion for the district court to conclude that the plaintiffs failed to demonstrate that the class issue of negligence predominated. *Exxon Mobil*, 461 F.3d at 603. That is the case here.[6]

Myers, rec. doc. 201, at pg. 14-15. Indeed, as in the present case, the crux of Myers' opposition to the grant of summary judgment was that common liability issues predominated, thus rendering class certification appropriate. The court, however, expressly

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[5]The court also noted, "without deciding the issue, that it appears that class certification is also inappropriate based on Myers' failure to satisfy the typicality, adequacy of representation and numerosity requirements of Rule 23(a), as well as the superiority requirement of Rule 23(b)(3)." *Myers*, rec. doc. 201, at pg. 20 fn. 7.

[6]The court also expressly rejected the case cited by the plaintiff in support of his position, *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 623 (5th Cir. 1999) wherein the class was certified under a specialized plan whereby the liability issues (seaman status, status of the Casino as a "vessel" within the meaning of the Jones Act, unseaworthiness and negligence) would be tried in an initial class trial, and then, only if the class prevailed on these issues, would the court permit a "second phase" of mini-trials in waves of five class members at a time to consider each plaintiff's individual issues of causation, damages and comparative negligence. *Id.* at pg. 15, fn. 4.

rejected Myers' argument.[7]

On October 7, 2010, DeHart filed a Motion to Certify this case as a class action. [rec. doc. 83]. In both his Petition and in his Motion to Certify Class, DeHart defines the proposed class as:

> All persons working on the L/B DIXIE PATRIOT or supply boats working in conjunction with the L/B DIXIE PATRIOT to dismantle the BP Platform during the period from approximately February 15, 2007 to at least April 30, 2007 and who were exposed to airborne radiation dust/t-norms.
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> The proposed Class is further subdivided as follows:
>
> a. Jones Act Seamen working on the L/B DIXIE PATRIOT or the supply boats working in conjunction with the L/B DIXIE PATRIOT on the project to dismantle the BP Platform; [and]
>
> b. Maritime workers working on the project to dismantle the BP Platform.

[rec. doc. 1-1, ¶ 3; 83, pg. 1].

The class allegations in DeHart's Petition and Class Certification Motion are virtually identical to those set forth by Myers in his lawsuit, with the exception that DeHart has extended the class exposure period two weeks, from February 15, 2007 to March 1, 2007. During oral argument, plaintiff's counsel candidly admitted that DeHart would have been a member of the Myers class had a class been certified. Moreover, counsel admitted that Myers would be a member of the DeHart class if this court certifies the class as requested here.

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[7]For ease, the Court refers herein to its prior ruling in *Myers v. BP America, Inc.,* 6:08cv0168 (W.D. La.), rec. docs. 201 and 203, without again detailing the reasons for ruling. The court's reasoning in *Myers* is adopted here by reference.

The remainder of the allegations in DeHart's Petition are likewise virtually identical to those in the *Myers* case. With respect to the propriety of permitting this case to proceed as a class action, plaintiff alleges that the class is so numerous that joinder of all members is impracticable, and that while plaintiff does not know the exact number of class members, he believes the number of members is "no more than one hundred and thirty members, including employees of Power, the vessel operator, owner's representatives and supervisors, and employees, *inter alia*, of Crown, PMI, Brand, Cenergy, Power, El Mar and Eagle, as well as members of the crew of the two supply boats." [*Id.* at ¶ 16].

With respect to his claims, which plaintiff alleges are typical of the claims of the class as a whole, plaintiff alleges that he became seriously ill, and afflicted with serious and permanent neurological, psychological, and pathological conditions, as a result of the movement, improper storage, cutting and removal of radioactive liquids, flow lines and other contaminated equipment on, and from, the deck of the L/B DIXIE PATRIOT and adjacent work areas. [*Id*. at ¶ 6 and 18].

Plaintiff further alleges that he, and each of the purported class members, "have sustained physical, mental and/or emotional injuries, fright, inconvenience, and other injuries associated with the exposure to airborne radiation dust/t-norms, in special damages in the particulars set forth hereinafter, and in general damages in an amount deemed just in the premises, all plus interest from judicial demand until paid and all costs . . . ." [*Id*. at ¶ 1]. Plaintiff also alleges that he and each other purported class member "suffered a significant

exposure to proven hazardous substances" and that as a result each have "a significantly increased risk of contracting a serious latent disease or diseases . . ." requiring medical monitoring. [*Id.* at ¶ 6].

Damages sought include those for past, present and future physical and mental pain and suffering, past present and future medical expenses including rehabilitation costs, doctor, hospital and pharmaceutical bills, costs for laboratory and physical examinations and diagnostic studies, past present and future loss of wages and fringe benefits, permanent disability and the cost of medical monitoring. [*Id*. at ¶ 13].

However, in his Opposition to the instant Motion, and in his Motion to Certify Class, DeHart alleges that he, unlike Myers, *has no symptoms* from his alleged exposure to radiation. He further distinguishes the cases on the basis that he, unlike Myers, is not a seaman.[8] Nevertheless, Dehart's class definition in his Petition and his Motion to Certify Class, does not distinguish between those who are symptomatic and those who are not symptomatic, and does not exclude those who are seamen.

In his Opposition to the instant Motion, DeHart attempts to "redefine" the class as consisting of approximately thirty-five persons who were in close proximity to, or had actual hands-on contact with, the NORM impacted material. Notably, Myers, who is alleged to be a seaman and who is alleged to be symptomatic, is expressly listed as a member of the

[8]In ruling upon DeHart's Motion to Remand, this court found that "as a matter of law, there is no possibility that plaintiff, John Paul DeHart, Jr., may be deemed a Jones Act seaman." [rec. doc. 69, pg. 15]. While Myers alleges that he is a seaman, this court has made no determination of Myers' status, that is, whether Myers is a seaman, a longshoreman or a land-based worker.

"redefined" class.[9] [rec. doc. 93, pg. 3].

In response to the Motion to Certify Class, the defendants filed the instant Motion for Summary Judgment, seeking summary disposition of DeHart's request for class certification without an evidentiary hearing.[10]

LAW AND ANALYSIS

Standard on Motion for Summary Judgment

Fed. R. Civ. P. 56(a) provides that summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[11]

Rule 56(e) provides, in pertinent part, as follows:

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c)[12], the court may: . . . (3) grant summary judgment if the motion and supporting materials

[9]The court notes that DeHart has filed a separate Motion to Redefine the Class Definition. [rec. doc. 97]. That Motion will be addressed by separate Ruling.

[10]For those reasons set forth in *Myers*, the undersigned again concludes that class certification may be determined on Motion for Summary Judgment without an evidentiary hearing.

[11]Rule 56 was revised, effective December 1, 2010, "to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged." *See* Committee Notes, Rule 56.

[12]Rule 56(c)(1) provides, in pertinent part, as follows:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

> – including the facts considered undisputed – show that the movant is entitled to it . . . .

The defendants' Motion for Summary Judgment is properly made and supported. Thus, DeHart may not rest on his allegations in his pleadings, but, rather, must go beyond the pleadings and designate specific facts demonstrating that there is a genuine issue for trial. *Celotex v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54 (1986).

However, metaphysical doubt as to the material facts, conclusory allegations, unsubstantiated assertions and those supported by only a scintilla of evidence are insufficient. *Little v. Liquid Air Corp*., 37 F.3d 1069, 1075 (5th Cir. 1994). Additionally, summary judgment is mandated against a party who fails to make a showing sufficient to establish an essential element of that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 106 S.Ct. at 2552.

DeHart has submitted evidence in opposition to the instant Motion. However, DeHart's evidence fails to demonstrate that there is a genuine issue of material fact necessitating a class certification hearing. Accordingly, summary judgment with respect to DeHart's request for class certification is appropriate in this case.

Collateral Estoppel/Issue Preclusion

The defendants argue that the class certification issue has already been decided by this court in the *Myers* case and, accordingly, the issue cannot be re-litigated by DeHart, because DeHart is bound by the *Myers* judgment under the doctrine of collateral estoppel, or issue preclusion. The undersigned disagrees.

Under the doctrine of collateral estoppel, or issue preclusion, "when an issue of ultimate fact has once been determined by a *valid and final judgment*, that issue cannot again be litigated between the same parties in any future lawsuit." *RecoverEdge L.P. v. Pentacost,* 44 F.3d 1284, 1290 (5th Cir. 1995) (emphasis added) *citing Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970), Restatement (Second) of Judgments § 27 (1982) and *Grogan v. Garner*, 498 U.S. 279, 284, 111 S.Ct. 654, 658, 112 L.Ed.2d 755 (1991).[13] Thus, collateral estoppel has "the dual purpose of protecting litigants from the burden of re-litigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Company v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645 (1979) *citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-329, 91 S.Ct. 1434, 1442-1443, 28 L.Ed.2d 788.

DeHart argues that the *Myers* judgment denying class certification was not a valid and final judgment for purposes of collateral estoppel or issue preclusion. In general, only final judgements are entitled to preclusive effect. *See J.R. Clearwater, Inc. v. Ashland Chem. Co.,* 93 F.3d 176, 179 (5th Cir. 1996). The parties disagree, however, as to whether a judgment denying class certification may be accorded preclusive effect. For the reasons

[13]Three elements are required for collateral estoppel to apply: (1) the issue at stake must be identical to the one involved in the prior action; (2) the issue must have been actually litigated in the prior action; and (3) the determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action. *RecoverEdge L.P.,* 44 F.3d at 1290 *citing Sheerin v. Davis (In re Davis)*, 3 F.3d 113, 114 (5th Cir. 1993) and *Parklane Hosiery Co.*, 439 U.S. at 326 & n. 5. In some cases, the Fifth Circuit has recognized a fourth requirement, that there be "no special circumstance that would render preclusion inappropriate or unfair." *Id*. at 1291 fn. 12.

which follow, under binding Fifth Circuit jurisprudence, the court finds that the *Myers* Judgment may not be accorded preclusive effect.

In *J.R. Clearwater*, the Fifth Circuit held that "the denial of class certification . . . lacks sufficient finality to be entitled to preclusive effect while the underlying litigation remains pending." *Id.* at 179. The Fifth Circuit noted several reasons in support of its holding that an order denying class certification is not a final judgment. First, citing the United States Supreme Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 466-68, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978)[14], the court noted that such a ruling is not "appealable as a matter of right." *Id.* at 179. Second, citing its prior opinion in *Avondale Shipyards v. Insured Lloyd's*, 786 F.2d 1265, 1269 (5th Cir.1986)[15], the court noted that such a ruling also was "subject to reconsideration by the district court under Federal Rule of Civil Procedure 23(c)(1)." *Id.* at fn. 2. In so noting, the Fifth Circuit expressly rejected the defendant's argument, which was based on a Second Circuit case and on the Restatement (Second) Judgments § 13, that something less than § 1291 finality is sufficient for purposes of issue preclusion, as the Fifth Circuit had declined to adopt that "more flexible notion of

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[14]In *Coopers & Lybrand,* the Court refused to extend the *Cohen* collateral order doctrine to cover class certification questions, finding *inter alia* that a Rule 23 class certification decision does not conclusively determine the disputed question, because the order is subject to revision in the district court and is subject to effective review after final judgment. *Id.* at 468-469. The Court also rejected mandatory appellate jurisdiction based on the "death knell" doctrine which allowed courts of appeal to review such orders if refusal to do so might make further litigation improbable or cause a plaintiff to abandon the litigation. *Id.* at 470-471. Rule 23(f) gives appellate courts discretion to entertain appeals in "death knell" cases. *See Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999).

[15]In *Avondale*, the Fifth Circuit was presented with the question of whether a partial summary judgment was entitled to collateral estoppel effect, an issue which the court viewed as "directly analogous" to a class certification ruling. *Id.* at fn 2.

finality" in *Avondale*. *Id*.

The defendants argue that *J.R. Clearwater* is no longer controlling as the holding in that case was abrogated by the 1998 enactment of Fed. R. Civ. P. 23(f), which allows an interlocutory appeal from an order granting or denying class certification. However, as the Committee Note accompanying the Rule makes clear, the appeal is not a matter of right, but, rather, the "court of appeals is given unfettered discretion whether to permit the appeal . . . [and such p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." *See also* 5 James William Moore et al., Moore's Federal Practice § 23.88[1] (3d ed. 2008) (noting that a district court's "certification decision is not immediately appealable as a matter of right").

In the context of an interlocutory appeal of a collective action certification order under the FLSA,[16] the Fifth Circuit has noted that "the holding in *Coopers & Lybrand* is abrogated to the extent that the subsequently enacted Federal Rule of Civil Procedure 23(f) specifically allows for interlocutory review of class certification decisions at the discretion of the respective courts of appeals under rule 23."[17]

However, it does not appear that the enactment of Rule 23(f) has abrogated the reasoning set forth in *J.R. Clearwater*. More specifically, the enactment did not nullify the Fifth Circuit's concerns that finality required both the existence of an appeal "as a matter of

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[16] 29 U.S.C. § 216(b)

[17] *Baldridge v. SBC Communications, Inc.*, 404 F.3d 930, 931 (5th Cir. 2005).

right" and that the ruling not be subject to revision or being set aside at the district court's discretion. Indeed, even after the enactment of Rule 23(f), the Fifth Circuit has continued to cite *J.R. Clearwater* favorably, and, more specifically, the requirement that a final judgment requires an appeal as a matter of right, not the mere possibility that a discretionary appeal may lie at the circuit court's whim. *See Harvey Specialty & Supply, Inc.,* 434 F.3d 320, 323-324 (5th Cir. 2005).

While the defendants argue, on the basis of case law from other jurisdictions, that something less than a final judgment is sufficient for issue preclusion, as noted above, this same argument was rejected by the Fifth Circuit in both *J.R. Clearwater* and *Avondale*. Indeed, the case primarily relied upon by the defendants, *In re Bridgestone/Firestone, Inc*., 333 F.3d 763, 767 (7th Cir. 2003), cites the exact section of the Restatement (Second) Judgments (§ 13) which the Fifth Circuit declined to adopt. Accordingly, the undersigned cannot accept the defendants' argument, as the argument is counter to binding Fifth Circuit precedent.

Rule 23 Requirements

While the *Myers* Judgment cannot be given preclusive effect, the reasoning in that case justifies denial of certification in the instant action.

"The purpose of class actions is to conserve 'the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion.'" *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 155

(1982); *Jenkins v. Raymark Ind.*, 782 F.2d 468, 471 (5th Cir. 1986). Plaintiffs have the burden of establishing that all requirements of Rule 23 have been satisfied. *Castano v. American Tobacco Co.,* 84 F.3d 734, 740 (5th Cir. 1996); *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005).

To satisfy this burden, the plaintiff must establish all of the following requirements of Rule 23(a): (1) a class "so numerous that joinder of all members is impracticable" ("numerosity"); (2) the existence of "questions of law or fact common to the class" ("commonality"); (3) class representatives with claims or defenses "typical . . . of the class" ("typicality"); and (4) class representatives that "will fairly and adequately protect the interests of the class" ("adequacy of representation"). Fed. R. Civ. P. 23(a); *Fleming v. Travenol Lab. Inc.*, 707 F.2d 829, 832 (5th Cir. 1983); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 606-608 and fn. 8, 117 S.Ct. 2231 (1997).

If any requirement is not met, the court must refuse to certify the class. *Castano*, 84 F.3d at 746; *Huff v. N.D. Cass Co.*,485 F.2d 710, 712 (5th Cir. 1973) (*en banc*). In addition, the plaintiff must establish that the action fits within one of the categories described in Rule 23(b). *Redditt v. Mississippi Extended Care Centers*, Inc., 718 F.2d 1381, 1387 (5th Cir. 1983). Plaintiffs, like DeHart, who seek class certification under Rule 23(b)(3) must demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual [class] members" ("predominance") and that "a class action is superior to other available methods for fairly and efficiently adjudicating the

controversy" ("superiority"). Fed. R. Civ. P. 23(b)(3); *Steering Committee v. Exxon Mobil Corp*., 461 F.3d 598, 601 (5th Cir. 2006) *citing Bell Atlantic Corp. v. AT&T Corp*., 339 F.3d 294, 301 (5th Cir. 2003).

In determining the propriety of certifying a class action, the question is not whether plaintiffs have stated a cause of action, or will prevail on the merits, but solely whether the requirements of Rule 23 have been met. *Floyd v. Bowen*, 833 F.2d 529, 534 (5th Cir. 1987). The district court has wide discretion in deciding whether to certify a proposed class. *Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993).

Rule 23(b)(3) Predominance Requirement

In this case, as in the *Myers* case, Rule 23(b)(3)'s requirement that common questions of law or fact must "predominate over any questions affecting only individual [class] members," is fatal to the plaintiff's proposed class and renders an analysis of the Rule 23(a) prerequisites unnecessary. *See Steering Committee*, 461 F.3d at 601; *Unger*, 401 F.3d at 320. To predominate, common issues must form a significant part of the individual cases. *See Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626 (5th Cir. 1999). The predominance requirement of Rule 23(b)(3) is "far more demanding" than the commonality requirement of Rule 23(a), because it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Unger*, 401 F.3d at 320.

In this case, the issue presented in both this and the *Myers* case is identical. In *Myers*, this court conclusively determined that the proposed class could not be certified

because the predominance requirement of Rule 23 could not be satisfied given "the myriad of uncommon disparate questions regarding causation" which "preclude[d] such a finding." *Myers*, rec. doc. 201, at pg. 14. That finding was based on the deposition testimony of the experts, who "uniformly testified that any claims asserted by potential class members would necessarily require individualized proof of specific causation including the location of each worker, the duration of exposure, the proximity to the NORM impacted material, and the medical causation, including pre-existing medical history, age, breathing rate, metabolic processes, uptake, absorption and elimination rates, susceptibility to illness and the effects of radiation, as well as analysis of individualized test results and data obtained from urinalysis or whole body counts, which, according to Dr. Sullivan, may be performed on each class member." *Id*. at pg. 12-13 *citing* Plato, depo pg. 16-22; Williams, depo. pg. 35-42 and 47-58; McWilliams, depo. pg. 78; Frazier, Defendants' Exhibit J, ¶ C(1)(c); Sullivan, Defendants' Exhibit K, ¶ C(1)(a) and (b) and depo. pg. 109-111; Thigpen, Defendants' Exhibit L, ¶ C(1). DeHart has offered no new expert evidence in support of class certification, or in opposition to the instant Motion, and, more specifically, to undermine this court's prior ruling that the Rule 23(b)(3) specificity requirement is not satisfied.

On the other hand, the defendants have again offered the depositions of their experts, including Dr. John R. Frazier, Dr. John B. Sullivan, Jr., and Dr. James Tate Thigpen[18],

[18]The defendants have additionally submitted the depositions of plaintiff's experts, Patricia Williams, Ph.D. and Phillip Plato, Ph.D., which were likewise offered in the *Myers* case. Neither have been asked to render opinions on any claimant other than Myers.

which this court relied on in the *Myers* case, as well as the affirmations of each as to the suitability of DeHart's proposed class for collective adjudication. Again, these experts all agree that, as in the *Myers* case, the claims asserted by DeHart in this case would necessarily involve individualized issues of specific and medical causation uncommon to the class as a whole, which renders class-wide adjudication inappropriate.[19].

Furthermore, in finding the Rule 23(b)(3) predominance requirement not satisfied, this court expressly rejected Myers' argument that the predominance requirement was satisfied because there was common liability issues which predominated. This ruling was primarily based on the Fifth Circuit's decision in *Steering Committee v. Exxon Mobil Corp*.,

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[19] *See* rec. docs. 88-5, 88-6, 88-7.

Dr. Frazier opines that "[r]adiation doses potentially received by workers (including DeHart) on the offshore platform at ST160 or on vessels assisting with the project in February through April 2007 would depend on many exposure factors (dose assessment pathways and parameters) that would vary significantly from one worker to another" and that "[t]he radiation health effects claims of each worker would be highly individualized as to each worker's location at the site, length of time on the job, proximity to NORM-impacted material, pre-existing medical history, susceptibility, type of symptoms, medical treatment, and types of alleged injuries."

Dr. Sullivan opines that "NORM has no specific, common or typical adverse health effects." That DeHart's medical complaints "are not known health effects of NORM exposure [and that h]e has alternative, medically reasonable causes for his health claims that are unrelated to alleged NORM exposure," Thus, "DeHart's claims cannot reasonably be considered inclusive, common, or typical of exposure to NORM." Finally, "[i]f there are other plaintiffs claiming exposure and health effects from NORM, they would each have to undergo an individualized medical causation analysis regarding their health claims in order to determine a causal link."

Dr. Thigpen opines that "[d]etermination of causation in each individual case alleging cancer risk as a result of radiation must take into account each of a number of factors, including (1) strength of association; (2) consistency of the observed association; (3) specificity; (4) temporality; (5) biological gradient; (6) biologically plausibility causation; (7) coherence; (8) experimental evidence; and analogy." Moreover, "[t]he level of exposure to radiation will certainly vary from individual to individual [and i]n each case, the level of exposure will determine whether there is any potential increase in risk and the degree to which that increase might be related to radiation." Furthermore, "the type of cancer will impact the likelihood that exposure to radiation is related . . . [and] other potential causes of the cancer in question will have to be evaluated for each individual." Finally class treatment "ignores that the critical factors in trying to determine causation will be very highly variable among the members of the potential class [and that e]ach case must be considered individually."

461 F.3d 598, 601-04 (5th Cir. 2006) and the decision of the Supreme Court in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231 (1997).[20]

DeHart now cites two cases from the United States District Court for the Eastern District of Louisiana, *Madison v. Chalmette Refining, LLC*, 2010 WL 2360677 (E.D. La. 2010) (unpublished) and *Chauvin v. Chevron Oronite Company, LLC*, 263 F.R.D. 364 (E.D. La. 2009), which he argues requires this court to reach a result opposite of that reached in *Myers*. The court finds neither case persuasive, binding, nor sufficient to upset this court's prior ruling.

In *Chauvin* the Court denied a Motion to Dismiss the class allegations, not a Motion for Summary Judgment. Thus, unlike the present case, or the *Myers* case, the ruling was based on the allegations in the plaintiff's Complaint; neither side presented any evidence in support of their respective positions. Accordingly, when discussing Rule 23(b)'s predominance and superiority requirements, the court merely cited the nine common issues of law and fact set forth in the plaintiff's Complaint.[21] *Id.* at 371. That is not the case here.

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[20]The court also cited *Salvant v. Murphy Oil, USA, Inc*., 2007 WL 2344912, *1 (E.D. La. 2002) (Fallon, J.) *citing Steering Committee*, 461 F.3d at 601-04 and *Hurd v. Monsanto Co.*, 164 F.R.D. 234, 239-40 (S.D. Ind. 1995) (collecting authorities), *Kemp v. Metabolife International, Inc*., 2002 WL 113894, *4 (E.D. La. 2002) (Berrigan, Chief J.) *citing In re Fibreboard Corp*., 893 F.2d 706 (5th Cir. 1990) and Hon. Martin L.C. Feldman, *Class Actions in the Gulf South Symposium: Predominance and Products Liability Class Actions: An Idea Whose Time Has Passed?,* 74 Tul. L.Rev. 1621 (2000).

[21]In regard to predominance, the court noted that "the record is not clear on the formation of damages, and as such the Class Certification hearing should be maintained so that the Court may make an informed decision on this issue. Both sides have legitimate arguments that should be put into the record before a decision should be made." *Id.* In regard to superiority, the court stated "[a]s with predominance, the arguments on the face of the pleadings do not create clear determinations, and as such would be more properly resolved in connection with the Class Certification Hearing." *Id.*

A class certification hearing was never held, however, because the case was subsequently compromised and

In both this and the *Myers* case, the parties have presented their evidence, including the depositions of the plaintiffs, witnesses and expert witnesses, and, based on that evidence, there is no genuine issue of material fact precluding the grant of summary judgement on the class certification issue.

In *Madison* the court went to great lengths to distinguish *Exxon Mobile,* ultimately finding that the facts were more similar to Fifth Circuit's earlier decision in *Watson v. Shell Oil*, 979 F.2d 1014 (5th Cir. 1992), wherein the court affirmed certification of the claims of a class of more than 18,000 plaintiffs arising from a refinery explosion, to be tried pursuant to a four phase trial plan. The facts of this case, however, as more fully set forth in the decision issued in the Myers case, are more akin to *Exxon Mobile*, the common fault issue proposed by plaintiff notwithstanding.

Furthermore, *Madison* involved exposure to a toxin (petroleum coke dust) for which there are common known reactions, namely, the "irritation type injuries" claimed by the plaintiffs. *Madison*, 2010 WL 2360677 at *3 and *1. However, as noted by Dr. Sullivan, exposure to NORM radiation causes "no specific, common or typical adverse health effects."[22] Thus, unlike the *Madison* case, this case will require a fact intensive individualized analysis of each plaintiff to determine a causal link for any claimed damages.

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dismissed on joint motion. *See Chauvin v. Oronite Company, LLC* 2:07-cv-0547 (E.D. La.), rec. docs. 58 and 59.

[22] rec. doc. 88-6, ¶ (C)(1)(a).

Despite this court's prior ruling, DeHart argues that the issue in this case is not identical because DeHart has now discovered additional facts which support his claim that the defendants failed to warn or protect the purported class members from exposure to allegedly high levels of radiation. However, these additional facts do not change this court's prior analysis on the issue of predominance. DeHart presents the same claims on behalf of the same purported class as did Myers, and he presents no new expert depositions or expert reports in support of class certification. Furthermore, the present argument, while presumably factually stronger as to whether liability may ultimately be established, is nevertheless the same legal argument presented by plaintiff to this court in the *Myers* case. Accordingly, there is no basis for this court to find that the legal issue presented in this case is not identical to that presented, and rejected, in the *Myers* case.

The court likewise cannot accept DeHart's claim that the instant class is not the same as that presented in the *Myers* case. While DeHart attempts to distinguish the classes on the basis of members who are symptomatic versus not symptomatic, and members who are seamen versus non-seamen, the court finds this argument unconvincing.

The class definition in both the Petition and DeHart's Motion to Certify Class does not distinguish between those who are symptomatic and those who are not, and does not exclude seamen. To the contrary, the Petition expressly raises claims that are reserved solely to those who enjoy seaman status. Moreover, DeHart's attempt to "redefine" the class does not cure this deficiency as Myers, who is alleged to be a seaman and who is

alleged to be symptomatic, is expressly listed as a member of the "redefined" class.

Finally, as was noted in the *Myers* case, each individual plaintiff, whether symptomatic or not symptomatic, must meet the burden of causation, "which, in turn, will depend on any number of factors enumerated by the experts who would testify at trial, including the level of each plaintiff's individual exposure (which will, in turn, depend on the length of time each spent at the job site and the location of each plaintiff on the site relative to the NORM impacted material) each plaintiff's pre-existing medical history, susceptibility to illness, type of symptom or illness each plaintiff may experience (if any), and type of medical treatment rendered, or which may be rendered, in the future." *Myers*, at pg. 15-16.

Thus, as in *Myers*, the court cannot accept DeHart's suggestion that the common fault issue raised by the non-symptomatic class members will predominate over those issues common to the entire proposed class. This is particularly true here, given the affirmations submitted by Drs. Frazier, Sullivan and Thigpen, do not which opine on Myers' claims, but rather on the claims asserted by DeHart, in which they uniformly conclude that individualized analysis will be necessary for each plaintiff of the purported class.[23]

Finally, the court cannot accept DeHart's suggestion that the non-symptomatic proposed class members have a common damage issue, entitling each to damages for legitimate fear and increased risk of contracting cancer as a direct result of the alleged exposure to radiation. As noted in *Myers*, "[t]his argument, however, merely begs the

[23] *See* fn. 17, *supra*.

question. Any purported class member's increased risk of contracting cancer can only be assessed following analysis of the various individual causitive factors set forth above. Each plaintiff's fear can only be determined individually, after assessing their knowledge of the facts and appraisal of what occurred, and on each individual's feelings and response, obviously a highly subjective and individualized inquiry. *See Hagerty v. L&L Marine Services, Inc*., 788 F.2d 315, 317 (5th Cir. 1986) and *Myers*, at 18-19.

This finding is further supported in this case by the affirmation of Dr. Thigpen, wherein he opines that determination of causation in each individual case alleging cancer risk as a result of radiation must take into account each of a number of individual factors, and that "[t]he level of exposure to radiation will certainly vary from individual to individual [and i]n each case, the level of exposure will determine whether there is any potential increase in risk and the degree to which that increase might be related to radiation." [rec. doc. 88-7, ¶ (C)(1)(a) and (b).].

In sum, this court has conclusively determined that the proposed class cannot be certified because specific causation, medical causation, damages and other issues individual to each purported class member predominate over the alleged common liability issues. Nothing presented by DeHart changes this court's prior conclusion. Accordingly, summary judgment is properly granted on this basis.[24]

[24]Although the undersigned has determined that class certification should be denied based on DeHart's failure to satisfy his burden of establishing predominance, without deciding the issue, as was the case in *Myers*, it appears that class certification is also inappropriate based on DeHart' failure to satisfy the typicality, adequacy of representation and numerosity requirements of Rule 23(a), as well as the superiority requirement of Rule 23(b)(3).

The same factors which preclude a finding of predominance likewise appear to preclude a finding of typicality. Rule 23(a)(3) requires that the claims of the class representatives be typical of the claims of the class. *In re Vioxx Products Liability Litigation*, 239 F.R.D. 450, 460 (E.D. La. 2006). Typicality does not require that these claims be identical, but rather that they share the same essential characteristics. *Id*. In *Myers*, the court noted Myers' extensive, unique and complex medical and employment history, and hence, it did not appear that Myers' claim would share the same essential characteristics of the absent class members' claims. The opposite scenario from that presented in the *Myers* case is presented here. Myers remains a member of the purported class. Given DeHart's alleged lack of a unique or complex medical history, it does not appear that DeHart's claim would share the same essential characteristics of the absent class members claims, and particularly, the claims asserted by Myers. To the contrary, in attempting to prove his claim, it does not appear that DeHart would necessarily prove Myers' claim or the claims of any other allegedly symptomatic absent class members.

Moreover, it does not appear that DeHart is an adequate class representative. A class representative must "possess the same interest and suffer the same injury as the [other] class members." *Amchem,* 521 U.S. at 625-626. The proposed class in this case does not distinguish between those members who, unlike DeHart, have experienced symptoms and those who have not. However, as recognized by the Supreme Court in *Amchem*, the interests of these subclasses (those members, like Myers, currently exhibiting poor health, and exposure only members) are not aligned. *Id*. at 626. For those experiencing symptoms, like Myers, the critical goal appears to be in obtaining a large present recovery, while the interest of the exposure only members appears to be in ensuring an ample fund for medical monitoring and payment of future expenses in the event of potential illness. *See Id.*

Additionally, plaintiff has presented no competent summary judgment evidence demonstrating that the number of potential claimants is so numerous that joinder is impracticable. To satisfy the numerosity prong, "a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members." *Pederson v. Louisiana State University,* 213 F.3d 858, 868 (5th Cir. 2000) *quoting Zeidman v. J. Ray McDermott & Co., Inc*., 651 F.2d 1030, 1038 (5th Cir.1981). "The mere allegation that the class is too numerous to make joinder practicable, by itself, is not sufficient to meet this prerequisite." *Fleming v. Travenol Laboratories, Inc*., 707 F.2d 829, 833 (5th Cir. 1983). While plaintiff has alleged numerosity in his pleadings, and has provided the deposition of DeHart's co-worker, Ronnie Bond, he has produced no proof of claims forms (or similar documents) for any other potential claimant, nor has he supplied information as to alleged length, duration or concentration of any alleged exposure of any worker other than perhaps Myers. Thus, it does not appear that the evidence presented brings DeHart's assertions of numerosity beyond the "mere allegation" level. To the contrary, despite the fact that this litigation has been pending for years, with the exception of the separate lawsuit filed by Myers nearly three years ago, this court may well be faced with a class of one.

Furthermore, DeHart's attempt to "redefine" the class to only thirty-five workers undermines any claim that the numerosity requirement may be satisfied. While there is no definitive number of members required for class certification, as noted by the United States Supreme Court in *General Telegraph Co. v. EEOC*, 446 U.S. 318, 330 and fn. 14 (1980), many courts have denied class certification in cases wherein there were less than 45 putative members. Moreover, a class of only thirty-five does not reach the benchmark of forty, generally required for application of a presumption that joinder is impracticable. *See In re Worldcom, Inc. Securities Litigation*, 219 F.R.D. 267, 279 (S.D. N.Y. 2003); *Bafus v. Aspen Realty, Inc*., 236 F.R.D. 652 (D. Idaho 2006).

Finally, the predominance of individual issues relating to causation and damages, detracts from the superiority of the class action device in resolving this litigation. *See Exxon Mobile*, 461 F.3d at 604-605. As noted by Judge Fallon, with respect to a proposed product liability class action lawsuit, any efficiencies that could be secured through class wide adjudication are outweighed by the difficulties associated with class management, given the predominance of individual issues. *In re Vioxx*, 239 F.R.D. at 463. Likewise, in this case, it appears that the predominance of individual issues renders adjudication on a class wide basis inferior to separate adjudication of any future claim. Furthermore, to the extent that there are only two known, and perhaps only a third, class member, there

Request for Injunction

The defendants also seek entry of an injunction precluding any purported class member from filing any state court proceedings regarding the alleged exposure to airborne radiation dust/t-norms during the decommissioning project at issue in this and the *Myers* litigation.

Initially, the court notes that the relitigation exception to the Anti-Injunction Act "is founded in the well-recognized concepts of *res judicata* and collateral estoppel." *Harvey Specialty*, 434 F.3d at 323. However, in light of the above discussion, this court has found that the *Myers* ruling has no preclusive effect in this case. Thus, it does not appear that the relitigation exception is applicable.

Nevertheless, "an injunction, even where allowed by the letter of the relitigation exception, remains permissive at the discretion of the federal court, which discretion should be 'exercised in the light of the historical reluctance of federal courts to interfere with state judicial proceedings.'" *Blanchard 1986, Ltd. v. Park Plantation, LLC*, 553 F.3d 405, 407-408 (5th Cir. 2008) (citations omitted). This is so because the "Anti-Injunction Act's 'prohibition' of injunctions against state court proceedings is grounded in federalism and 'rests on the fundamental constitutional independence of the States and their courts.'" *Id*. at

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appears to be little, if any, benefit derived by class-wide adjudication. To the contrary, each suit may easily be tried separately.

408 *citing Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970).

Thus, the Fifth Circuit, "take[s] the view that a complainant must make a strong and unequivocal showing of relitigation of the same issue in order to overcome the federal courts' proper disinclination to intermeddle in state court proceedings." *Id*. (citations omitted). Moreover, nothing is lost if a federal court does not issue an injunction because "a state court is as well qualified as a federal court to protect a litigant by the doctrines of *res judicata* and collateral estoppel." *Id*. (citations omitted). Accordingly, if there is any question as to the propriety of an injunction, a federal court must resolve the question in favor of permitting the state court action to proceed. *Harvey Specialty*, 434 F.3d at 324 (citations omitted).

In this case, the court declines to exercise its discretion. The defendants failed to make the required "strong and unequivocal showing" required for issuance of an injunction. Moreover, at this time, there is no known suit which has been filed in state court by any other purported class member, and there has been no indication that any such a suit will be filed in the future. Finally, in the event that such a suit has been, or will be, filed, the defendants' interests will be more than adequately protected by the state court's application of the doctrines of *res judicata* and/or collateral estoppel. The defendants request for an injunction will therefore be denied.

CONCLUSION

For the above reasons, the defendants' Motion for Partial Summary Judgement [rec. doc. 88] is **granted**, and accordingly, the **plaintiff's request to certify** this matter as a **class action** is **denied.** The defendants request for an injunction is **denied**.

Signed this 5th day of January, 2011, at Lafayette, Louisiana.

C. MICHAEL HILL
UNITED STATES MAGISTRATE JUDGE