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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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6 AVERY FONG, et al.,

7 Plaintiffs,

8 v.

9 ASBESTOS DEFENDANTS (B\*P),  
10 et al.,

11 Defendants.

NO. C10-0287 TEH

ORDER GRANTING MOTION  
TO REMAND

12  
13 This matter comes before the Court on Plaintiffs' motion to remand. After carefully  
14 reviewing the parties' written arguments, the Court finds oral argument to be unnecessary  
15 and now GRANTS Plaintiffs' motion for the reasons set forth below.

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17 **BACKGROUND**

18 Sherman Fong filed a complaint in the Superior Court of California for the County of  
19 San Francisco on August 21, 2009, alleging asbestos-related injuries against various  
20 defendants, including Defendant Metalclad Insulation Corporation. Mr. Fong alleges that he  
21 was exposed to asbestos while working as a shipfitter at Mare Island Naval Shipyard from  
22 1956 to 1986. Metalclad's alleged liability stems from its involvement in brokering shipment  
23 of Unibestos thermal insulation from Pittsburgh Corning Corporation to Mare Island. It is  
24 undisputed that Unibestos, which was used in the nuclear reactor compartments of four  
25 submarines on which Mr. Fong worked, contained asbestos.

26 Mr. Fong passed away in September 2009, and Plaintiffs Avery Fong, Sing Yee Fong,  
27 Connie Wong, and Arlene Young subsequently filed an amended complaint for survival and  
28 wrongful death. The amended complaint identifies Avery Fong as Sherman Fong's

1 successor-in-interest and the other three Plaintiffs as Sherman Fong’s siblings and legal heirs.  
2 The summons on the amended complaint was issued on December 30, 2009.

3 Metalclad timely removed the case to this Court on January 21, 2010, under 28 U.S.C.  
4 § 1442(a)(1). Plaintiffs now seek remand back to state court.

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6 **DISCUSSION**

7 The federal officer removal statute, 28 U.S.C. § 1442(a)(1), provides for removal of a  
8 state action to federal court by “[t]he United States or any agency thereof or any officer (or  
9 any person acting under that officer) of the United States or of any agency thereof, sued in an  
10 official or individual capacity for any act under color of such office.” A party seeking  
11 removal under this section “must demonstrate that (a) it is a ‘person’ within the meaning of  
12 the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal  
13 officer’s directions, and plaintiff’s claims; and (c) it can assert a ‘colorable federal defense.’”  
14 *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006) (citing *Jefferson*  
15 *County v. Acker*, 527 U.S. 423, 431 (1999); *Mesa v. California*, 489 U.S. 121, 124-25,  
16 131-35 (1989)). Although removal statutes are generally to be construed strictly, “when  
17 federal officers and their agents are seeking a federal forum, we are to interpret section 1442  
18 broadly in favor of removal.” *Id.* at 1252. Thus, for example, the asserted federal defense  
19 need only be “colorable” and not “clearly sustainable . . . . The officer need not win his case  
20 before he can have it removed.” *Willingham v. Morgan*, 395 U.S. 402, 407 (1969).

21 Nonetheless, for the reasons discussed below, the Court finds that Metalclad has failed  
22 to raise a colorable federal defense to Plaintiffs’ claims. Metalclad relies on the government  
23 contractor defense, which “immunizes contractors who supply military equipment to the  
24 Government from the duties imposed by state tort law.” *In re Hawaii Fed. Asbestos Cases*,  
25 960 F.2d 806, 810 (9th Cir. 1992). This defense can be invoked “when (1) the United States  
26 approved reasonably precise specifications; (2) the equipment conformed to those  
27 specifications; and (3) the supplier warned the United States about the dangers in the use of  
28 the equipment that were known to the supplier but not to the United States.” *Boyle v. United*

1 *Technologies Corp.*, 487 U.S. 500, 512 (1988). However, “[w]here the goods ordered by the  
2 military are those readily available, in substantially similar form, to commercial users, the  
3 military contractor defense does not apply.” *In re Hawaii*, 960 F.2d at 811.

4 Based on the same evidence presented in this case, another court in this district  
5 recently concluded that:

6 At most, Metalclad demonstrates that the Unibestos was subject  
7 to testing by the United States Navy and that the Navy approved  
8 Unibestos as a material to be used. In fact, the witness Metalclad  
9 relies on to demonstrate that the Unibestos qualifies as “military  
10 equipment,” Dan H. Helfin [sic], Jr. (“Heflin”), testified that he  
11 does not know whether the Unibestos brokered to the military  
12 was altered, manipulated or redesigned in any way. Heflin said  
13 that he did not know what physical differences there were, that he  
14 did not know what made it a special run of Unibestos, and that he  
15 did not know if [it] was manufactured differently than any other  
Unibestos made by Pittsburgh Corning. He further testified that  
he has no knowledge regarding whether or not the exact kind of  
Unibestos brokered by Metalclad for use on the submarines was  
sold to the private sector. Moreover, Donald Trueblood, the  
person Metalclad offered at the deposition of the “person most  
knowledgeable,” testified that he could not say that there were  
any changes in the formulation of the Unibestos that was used on  
the four submarines Plaintiff worked on, as opposed to the  
Unibestos available to the general public.

16 *Delahaye v. Asbestos Defs.*, Case No. C09-5504 JSW, 2010 WL 366611, at \*3 (N.D.  
17 Cal. Jan. 25, 2010) (citations omitted). Consequently, the court found “that Metalclad has  
18 not met its burden to demonstrate a colorable federal defense” and remanded the case to the  
19 state court from which it was removed. *Id.* at \*4.

20 Metalclad failed to distinguish – or even cite – *Delahaye*, and this Court finds no basis  
21 for distinguishing that case or departing from that court’s reasoning. Accordingly, the Court  
22 finds that Metalclad’s removal under 28 U.S.C. § 1442(a)(1) was improper because  
23 Metalclad has not demonstrated that it has a colorable federal defense to Plaintiffs’ claims.

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**CONCLUSION**

For the reasons discussed above, Plaintiffs' motion to remand is GRANTED. The hearing scheduled for April 26, 2010, is VACATED. This matter is hereby remanded forthwith to the Superior Court of California for the County of San Francisco. The Clerk shall close the file.

**IT IS SO ORDERED.**

Dated: 04/15/10

  
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THELTON E. HENDERSON, JUDGE  
UNITED STATES DISTRICT COURT