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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY CULVER, et al.,

Plaintiffs ,

v.

ASBESTOS DEFENDANTS (BP), et al.,

Defendants.

No. C 10-03484 SI

[PROPOSED] AMENDED ORDER
DENYING PLAINTIFF'S MOTION TO
REMAND AS TO DEFENDANT U.S.
STEEL; SEVERING CLAIMS AGAINST
U.S. STEEL; AND REMANDING
REMAINING CLAIMS TO STATE
COURT

On November 4, 2010, the Court heard argument on plaintiff's motion to remand to state court. Having considered the arguments of counsel and the papers submitted, the Court hereby DENIES plaintiff's motion to remand as to removing defendant U.S. Steel. Since both parties agreed to sever the claims against defendant from the remainder of this case at the hearing, the Court also SEVERES the claims against defendant U.S. Steel from the rest of the case, and the balance of the case is REMANDED to the San Francisco County Superior Court.

BACKGROUND

Plaintiff Timothy Culver, heir and successor-in-interest to decedent Robert Culver, brings this suit for wrongful death as a result of decedent's exposure to asbestos. *See* Notice of Removal, Ex. B (First Am. Compl.). Plaintiff's first amended complaint names 36 defendants and lists over 25 alleged occurrences of exposure to asbestos. *Id.* Plaintiff claims that some of these exposures occurred when decedent served aboard the *Sea Blenny* in 1947, and when he served aboard the *Sailor's Splice* in 1951. *Id.* at 12-13. It is undisputed that the *Sea Blenny* was built by Western Pipe & Steel ("Western") in 1945, and the *Sailor's Splice* was built by Consolidated Steel Corporation ("Consolidated") in 1945. Decl. of David F. Beach, Ex. F, G.

1 According to U.S. Steel, both *Sea Blenny*, a C-3 model ship, and *Sailor's Splice*, a C-1
2 model ship, were built for military use. Beach Decl., Ex. F, G. During World War II, the Maritime
3 Commission ("Commission") designed and developed such C-1 and C-3 ships as part of the
4 government's effort to construct numerous military ships in a short period of time. Beach Decl.,
5 Ex. H., at 1460-64. The Commission allegedly wrote the specifications for these ships, which
6 included the use of materials that contained asbestos. *Id.* at 1463-64, 1466, 1483, 1487-88. The
7 Commission also allegedly put inspectors in the shipyards to ensure that the ships were
8 constructed pursuant to their plans and specifications. *Id.* at 1464.

9 On July 15, 2008, decedent filed an action for personal injury and loss of consortium
10 caused by exposure to asbestos in the San Francisco County Superior Court, to which U.S. Steel
11 was not a party. *See* Notice of Removal, Ex. A (Compl.). Decedent passed away on September 7,
12 2009, while that action was pending. *Id.*, Ex. B (First Am. Compl.). Timothy Culver was
13 substituted as the plaintiff, and on January 8, 2010, the complaint was amended to state a claim for
14 wrongful death. *Id.* U.S. Steel was served with the first amended complaint on January 14, 2010.
15 *Id.*; Beach Decl., Ex. C.¹ U.S. Steel filed its notice of removal on August 9, 2010, claiming that
16 this Court has "federal officer" removal jurisdiction pursuant to 28 U.S.C. § 1442(a)(1).

17 Presently before the Court is plaintiff's motion to remand to the superior court due to lack
18 of subject matter jurisdiction.

19 LEGAL STANDARD

20 A motion to remand is the proper procedure for challenging an opposing party's removal.
21 Remand to state court may be ordered either for lack of subject matter jurisdiction or for any
22 defect in removal procedure. *See* 28 U.S.C. § 1447(c). The court may remand *sua sponte* or upon
23 the motion of a party. A defendant who invokes the federal court's removal jurisdiction has the
24 burden of establishing federal jurisdiction. *See Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195
25 (9th Cir. 1988) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921)).

26
27 ¹ U.S. Steel claims it only became aware of the basis of the claim against it through responses to
28 special interrogatories served on July 23, 2010. *See* Notice of Removal, Ex. B (First Am. Compl.
¶¶ 4-5), E.

1 In addition to the more common federal question and diversity grounds for removal,
2 pursuant to 28 U.S.C. § 1442(a), “[f]ederal officers, and their agents, may remove cases based on
3 acts performed under color of their federal office if they assert a colorable federal defense.”
4 *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006) (citing 28 U.S.C.
5 § 1442(a); *Mesa v. California*, 489 U.S. 121, 129 (1989)). “A party seeking removal under
6 section 1442 must demonstrate that (a) it is a ‘person’ within the meaning of the statute; (b) there
7 is a causal nexus between its actions, taken pursuant to a federal officer’s directions, and
8 plaintiff’s claims, and (c) it can assert a ‘colorable federal defense.’” *Id.* (citing *Jefferson County*
9 *v. Acker*, 527 U.S. 423, 431 (1999)).

10 Unlike the general removal statutes, which “are to be strictly construed, and any doubts as
11 to the right of removal must be resolved in favor of remanding to state court,” *id.* at 1252 (citation
12 omitted), “the Supreme Court has mandated a generous interpretation of the federal officer
13 removal statute,” *id.* (citing *Colorado v. Symes*, 286 U.S. 510, 517 (1932)). There is, according to
14 the Ninth Circuit, “a clear command from both Congress and the Supreme Court that when federal
15 officers and their agents are seeking a federal forum, we are to interpret section 1442 broadly in
16 favor of removal.” *Id.* Also unlike the general removal statutes, under section 1442, not all
17 defendants need concede to removal. *See Eli Valley Mines, Inc. v. Hartford Accident & Indem.*
18 *Co.*, 644 F.2d 1310, 1315 (9th Cir. 1981) (“Thus, § 1442 represents an exception to the general
19 rule (under §§ 1441 and 1446) that all defendants must join in the removal petition.”). One
20 defendant in a multi-defendant case can unilaterally remove the entire case to federal court if it
21 meets the requirements of section 1442. *See id.*

22 DISCUSSION

23 Plaintiff argues that U.S. Steel’s removal was substantively deficient because U.S. Steel
24 has not established that it meets the requirements of § 1442(a). Plaintiff also argues that the Court
25 should remand this case because U.S. Steel removed the case to federal court as a delaying tactic.

27 I. Evidentiary Objection

28 In opposing plaintiff’s motion to remand, U.S. Steel offers as evidence the testimony of

1 Charles Cushing in the unrelated case *Franklin v. Owens Corning*, purporting to show why this
2 Court has “federal officer” jurisdiction. Beach Decl., Ex. H. In his reply, plaintiff moved to strike
3 this testimony, arguing that Cushing’s testimony is inadmissible hearsay that does not fall under
4 the hearsay exception in Federal Rule of Evidence 804(b)(1).² On November 2, 2010, the Court
5 issued an order granting U.S. Steel leave to respond to plaintiff’s evidentiary objection. In its
6 response, U.S. Steel conceded that neither plaintiff nor decedent were parties to *Franklin*.
7 However, U.S. Steel argued that Franklin was a predecessor in interest to plaintiff because
8 Franklin had a similar motive and opportunity to cross-examine Cushing.

9 Rule 804(b)(1) states:

10 The following are not excluded by the hearsay rule if the
11 declarant is unavailable as a witness:

12 (1) Former testimony. Testimony given as a witness at
13 another hearing of the same or a different proceeding, or in a
14 deposition taken in compliance with law in the course of the same or
15 another proceeding, if the party against whom the testimony is now
16 offered, or, in a civil action or proceeding, a predecessor in interest,
17 had an opportunity and similar motive to develop the testimony by
18 direct, cross, or redirect examination.

19 In the context of a civil action, this rule requires that (1) the declarant be unavailable; (2)
20 the testimony be given by a witness at another hearing of the same or a different proceeding; and
21 (3) the testimony be offered against a party or a “predecessor in interest” of a party that had an
22 opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

23 **A. Availability**

24 A declarant is unavailable when he “is absent from the hearing and the proponent of a
25 statement has been unable to procure the declarant’s attendance . . . by process or other reasonable

26 _____
27 ² Plaintiff also argues that the Court should not consider Cushing’s testimony because U.S. Steel
28 may not present new evidence to the Court in its opposition to the motion to remand. In support of
this argument, plaintiff cites *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995), claiming it
stands for the proposition that “[i]f the notice of removal is devoid of facts necessary to support
removal, the court may remand despite presentation of new facts in opposition to a remand
motion.” Pl. Reply, at 3. This argument, however, mischaracterizes *Laughlin*. *Laughlin* stands for
the proposition that when a diversity case has been removed to federal court under 29 U.S.C. §
1441, the defendant must establish the amount in controversy either on the face of the petition or
in the removal notice. *Laughlin*, 50 F.3d at 873. It is inapplicable to the present case.

1 means.” Fed. R. Evid. 804(a)(5). At the November 4 hearing, U.S. Steel represented that Cushing
2 resides in New York. Plaintiff did not challenge that representation. As Cushing resides in New
3 York, he is outside of the Court’s subpoena power. *See* Fed. R. Civ. Pro. 45(c)(3)(A)(ii);
4 *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1019 (9th Cir. 2004). Because
5 U.S. Steel could not procure Cushing’s
6 attendance by process, he is unavailable.

7 **B. Testimony of a Witness at a Hearing**

8 The parties do not dispute that the transcript U.S. Steel wishes admitted is a transcript of
9 Cushing’s in court testimony in *Franklin*.

10 **C. Predecessor in Interest**

11 Plaintiff argues that neither he nor decedent was a party to *Franklin*. U.S. Steel argues that
12 the relevant question is whether either party examining Cushing had a similar motive to examine
13 him as plaintiff would have here, and whether that party had the opportunity to examine him.

14 The Ninth Circuit has not ruled on whether any party with a similar motive and
15 opportunity to cross-examine the declarant can be considered a predecessor in interest under Rule
16 804(b)(1) even if there is no privity between the parties. *See Nelson v. Fibreboard Corp.*, 912 F.2d
17 469 (Table), 1990 WL 125341, *1 (9th Cir. 1990) (explaining that the court did not need to take a
18 position on this question).

19 The Committee Notes to the 1974 amendment make clear that the term “predecessor in
20 interest” adds at least some requirement to, rather than merely describes, a party that had an
21 opportunity and similar motive to develop the testimony:

22 Rule 804(b)(1) as submitted by the Court allowed prior testimony of
23 an unavailable witness to be admissible if the party against whom it
24 is offered or a person “with motive and interest similar” to his had
25 an opportunity to examine the witness. The Committee considered
26 that it is generally unfair to impose upon the party against whom the
27 hearsay evidence is being offered responsibility for the manner in
28 which the witness was previously handled by another party. The sole
exception to this, in the Committee’s view, is when a party’s
predecessor in interest in a civil action or proceeding had an
opportunity and similar motive to examine the witness. The
Committee amended the Rule to reflect these policy determinations.

1 H. Rep. No. 93-1597 (House Committee on the Judiciary 1974); *see also* S. Rep. No. 93-1277
2 (Senate Committee on the Judiciary 1974) (“[W]e accept the House amendment.”).

3 The Third, Fourth, and Sixth Circuits have all taken the position that the term “predecessor
4 in interest” actually adds quite little to the rest of the requirements of the rule. To reach this
5 conclusion, the Third and Sixth Circuits isolated a sentence in the Senate Report that indicates that
6 the Senate accepted the House amendment—adding “predecessor in interest” to the rule proposed
7 by the Supreme Court—because the “difference between the two versions is not great.” S. Rep.
8 No. 93-1277 (Senate Committee on the Judiciary 1974). As these courts have explained,

9 While we do not endorse an extravagant interpretation of who or
10 what constitutes a “predecessor in interest,” we prefer one that is
11 realistically generous over one that is formalistically grudging. We
12 believe that what has been described as “the practical and expedient
13 view” expresses the congressional intention: “if it appears that in the
14 former suit a party having a like motive to cross-examine about the
15 same matters as the present party would have, was accorded an
16 adequate opportunity for such examination, the testimony may be
17 received against the present party.” Under these circumstances, the
18 previous party having like motive to develop the testimony about the
19 same material facts is, in the final analysis, a predecessor in interest
20 to the present party.

17 *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289, 1295 (6th Cir. 1983) (quoting *Lloyd v. Am.*
18 *Export Lines, Inc.*, 580 F.2d 1179, 1187 (3d Cir. 1978)). It does not appear that any circuit court
19 has expressly disavowed this interpretation of Rule 804. Accordingly, the Court adopts this
20 interpretation.

21 The Court must now determine whether “the previous party [had] like motive to develop
22 the testimony about the same material facts.” *See id.*; *Lloyd*, 580 F.2d at 1187. At the November 4
23 hearing, plaintiff argued that Franklin did not have a similar motive to develop the testimony
24 because plaintiff would have chosen to object to specific parts of Cushing’s testimony had he been
25 a party to that case.

26 Franklin had a similar motive to develop Cushing’s testimony. Like the present case,
27 *Franklin* was a civil case in which the defendant was charged with contributing to the plaintiff’s
28 mesothelioma. During Cushing’s testimony, Franklin had a motive to prevent the defendant from

1 shifting responsibility for using asbestos to the government. Franklin was also represented by
2 counsel, who had an opportunity to cross-examine Cushing at trial. That plaintiff would have
3 made the strategic decision to object to certain parts of Cushing's testimony that Franklin did not,
4 does not mean that Franklin did not share a motive similar to plaintiff's. Franklin was a
5 predecessor in interest to plaintiff.

6 Cushing's testimony is admissible and can be considered when determining whether this
7 Court has "federal officer" jurisdiction.

8

9 **II. Removal Is Proper Because U.S. Steel Has Satisfied the *Mesa* Factors**

10 In order to obtain removal under § 1442(a)(1), U.S. Steel must (1) demonstrate that it is a
11 person within the meaning of the statute, (2) demonstrate that it acted under the direction of a
12 federal officer, (3) demonstrate a causal nexus between plaintiff's claims and acts it performed
13 under color of federal office, and (4) raise a colorable federal defense to plaintiff's claims. *Mesa v.*
14 *California*, 489 U.S. 121, 124-25, 134-35 (1989).

15 **A. U.S. Steel Is a Person Within the Meaning of the Statute**

16 U.S. Steel must demonstrate that it qualifies as a person within the meaning of the statute
17 in order to seek removal pursuant to it. A "purely legal person such as a corporation could be
18 engaged in activities that amount to the implementation of a federal policy under the direction of a
19 government officer such that state court suits against those corporations could disrupt the
20 execution of federal law." *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992) (citation
21 omitted). U.S. Steel is a corporation and is therefore a person within the meaning of 28 U.S.C. §
22 1442(a)(1). *See id.*

23 **B. U.S. Steel Acted Under the Direction of a Federal Officer**

24 U.S. Steel must also show that its actions were sufficiently controlled by a federal officer
25 that U.S. Steel's liability arising from such actions needs to be adjudicated in federal court. If U.S.
26 Steel "establishes only that the relevant acts occurred under the general auspices of a federal
27 officer, such as being a participant in a regulated industry, they are not entitled to § 1442(a)(1)
28 removal." *Id.* (citation omitted). Instead, U.S. Steel must show that the federal government had

1 “direct and detailed control” over it. *Id.* In *Fung*, direct and detailed control was shown where the
2 federal government contracted with the defendant to build submarines, monitored defendant’s
3 performance, ensured complete conformity by defendant with design specifications, and “required
4 the defendant to construct and repair the vessels in accordance with the applicable and approved
5 specifications incorporated into the contracts.” *Id.* at 572-73.

6 Cushing’s testimony is sufficient to demonstrate that the Maritime Commission had direct
7 and detailed control over the way U.S. Steel’s predecessors, Consolidated and Western,
8 manufactured the *Sea Blenny* and *Sailor’s Splice*. The Commission designed and developed C-1
9 and C-3 ships. Beach Decl., Ex. H., at 1460-64. The Commission wrote the specifications for
10 these ships, which specified that Consolidated and Western use materials that contained asbestos.
11 *Id.* at 1463-64, 1466, 1483, 1487-88. In addition, the Commission placed government inspectors
12 in the shipyards to ensure that the ships conformed to the Commission’s plans and specifications.
13 *Id.* at 1464.

14 Other courts have held that there was direct and detailed control over military contractors
15 in similar circumstances. *See, e.g., Redman v. A.W. Chesterton Co.*, No. 08-3013, 2008 WL
16 4447729, at *4 (N.D. Cal. Sept. 30, 2008) (requisite control found over contractors in marine
17 distilling plants manufactured for sale to the United States Navy); *Oberstar v. CBS Corp.*, No. CV
18 08-118 PA, 2008 U.S. Dist. LEXIS 14023, at *12 (C.D. Cal. Feb. 11, 2008) (requisite control
19 found over contractors who manufactured equipment used on Navy ships). Cushing’s testimony is
20 sufficient to meet U.S. Steel’s burden of demonstrating direct and detailed control at this stage in
21 the proceedings.

22 **C. There Is a Causal Nexus Between Defendant’s Acts and Plaintiff’s Claims**

23 U.S. Steel must show that there is a causal nexus between U.S. Steel’s acts under color of
24 federal office and plaintiff’s claims. Plaintiff’s claims arise from plaintiff’s service aboard the
25 ships *Sea Blenny* and *Sailor’s Splice* in 1947 and 1951, respectively. As explained above, U.S.
26 Steel has provided sufficient evidence that it acted under the direct and detailed control of the
27 Maritime Commission when it manufactured these ships for the military. Therefore, there is a
28 sufficient causal nexus between U.S. Steel’s actions pursuant to military control and plaintiff’s

1 claims.

2 **D. U.S. Steel Raises a Colorable Federal Defense to Plaintiff's Claims**

3 Finally, U.S. Steel must show that it has a colorable federal defense. *See Mesa*, 489 U.S. at
4 128. Pursuant to the *Durham* policy favoring removal for federal officers, a defendant does not
5 need to show a valid or likely successful federal defense, but merely a colorable one. *Durham*, 445
6 F.3d at 1252.

7 In this case, U.S. Steel invokes the military contractor defense, which shields military
8 contractors from state tort law liability for defects in military equipment supplied to the United
9 States when: "(1) the United States approved reasonably precise specifications; (2) the equipment
10 conformed to those specifications; and (3) the supplier warned the United States about the dangers
11 in the use of the equipment that were known to the supplier but not to the United States." *Boyle v.*
12 *United Tech. Corp.*, 487 U.S. 500, 512 (1988).

13 As discussed above, Cushing's testimony is evidence that the Commission wrote the
14 specifications for C-1 and C-3 ships, and ensured that Consolidated and Western complied with
15 these specifications. Beach Decl., Ex. H., at 1460-64, 1466, 1483, 1487-88. Furthermore, U.S.
16 Steel has presented evidence that the dangers of asbestos were already known to the United States,
17 and therefore it was not necessary for U.S. Steel to warn the government about these dangers. To
18 show this, U.S. Steel relies on "Minimum Requirements for Safety and Industrial Health in
19 Contract Shipyards," a pamphlet published by the Navy and Maritime Commission in 1943. Beach
20 Decl., Ex. I. This pamphlet identifies asbestos as a potential health hazard and recommends that
21 special safety precautions be taken when working with asbestos. *Id.* §§ 11.1, 13.7.

22 U.S. Steel made a sufficient showing that it is a person that acted under the direction of a
23 federal officer, there is a causal nexus between its actions and plaintiff's claims, and it can assert a
24 colorable federal defense. Therefore, "federal officer" jurisdiction is proper under § 1442(a)(1).
25

26 **III. Removal as a Delaying Tactic**

27 Plaintiff also argues that the Court should remand this case because U.S. Steel removed the
28 case to federal court as a delaying tactic, prejudicing plaintiff and wasting judicial resources.

1 Plaintiff claims that U.S. Steel is seeking “to avail itself of the glacial pace that is the hallmark of
2 federal asbestos multi-district litigation, the ‘black hole’ that is the federal asbestos MDL.” Pl.
3 Mot. to Remand, at 5. Plaintiff’s argument as to motive is unsupported and is rejected.
4

5 **CONCLUSION**

6 The Court hereby DENIES plaintiff’s motion to remand (Docket No. 10). The Court also
7 severs the claims against U.S. Steel from the rest of the case, and the balance of the case is
8 REMANDED to San Francisco County Superior Court.

9 **IT IS SO ORDERED.**

10
11 DATED: December __, 2010



SUSAN ILLSTON
United States District Judge