

United States District Court  
For the Northern District of California

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

JOHN DOBROCKE and DARLENE DEBROCKE,  
Plaintiffs,  
v.  
ALLIS-CHALMERS CORPORATION PRODUCT  
LIABILITY TRUST, et al.,  
Defendants.

No. C 09-01456 CW  
ORDER GRANTING  
PLAINTIFFS' MOTION  
TO REMAND

Plaintiffs John and Darlene Debrocke move to remand this action to state court. Defendant Foster Wheeler, LLC, opposes the motion. Having considered all of the papers filed by the parties, the Court grants Plaintiffs' motion.

BACKGROUND

On February 13, 2009, Plaintiffs filed suit in the San Francisco superior court alleging personal injury and loss of consortium against numerous defendants, among them Foster Wheeler. Plaintiff John Dobrock formerly worked with asbestos as an insulator and now suffers from asbestos-related lung disease. The precise nature of Plaintiffs' allegations against Foster Wheeler is unclear. The only mention in the complaint of Foster Wheeler by name is the following: "Plaintiffs' claims against defendant FOSTER

1 WHEELER LLC (FKA FOSTER WHEELER CORPORATION) exclude plaintiff's  
2 asbestos exposure at military and federal government jobsites and  
3 aboard U.S. Navy vessels."

4 DISCUSSION

5 I. Remand

6 Defendant Foster Wheeler argues that it properly removed this  
7 action under the federal officer removal statute, which provides  
8 that an action may be removed by "any officer of the United States  
9 or any agency thereof, or person acting under him, for any act  
10 under color of such office." 28 U.S.C. § 1442(a)(1).<sup>1</sup>

11 Generally, removal statutes are to be strictly construed; any  
12 doubt as to the right to remove should resolved in favor of  
13 remanding to state court. See, e.g., Gaus v. Miles, Inc., 980 F.2d  
14 564, 566 (9th Cir. 1992). But that is not the case concerning the  
15 federal officer removal statute. See Durham v. Lockheed Martin  
16 Corp., 445 F.3d 1247, 1252 (9th Cir. 2006) (noting that, because it  
17 is important to the federal government to protect federal officers,  
18 removal rights under section 1442 are much broader than those under  
19 section 1441). The Ninth Circuit instructs that there is a "clear  
20 command from both Congress and the Supreme Court that when federal  
21 officers and their agents are seeking a federal forum, we are to  
22 interpret section 1442 broadly in favor of removal." Id. (noting

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23 <sup>1</sup>Specifically, § 1442(a)(1) provides:

24 A civil or criminal prosecution commenced in a State court  
25 against any of the following persons may be removed by them to  
26 the district court of the United States for the district and  
27 division embracing the place wherein it is pending:

28 (1) Any officer of the United States or any agency thereof, or  
person acting under him, for any act under color of such  
office or on account of any right, title or authority claimed  
under any Act of Congress for the apprehension or punishment  
of criminals or the collection of the revenue.

1 that the Supreme Court has "insisted that the policy favoring  
2 removal 'should not be frustrated by a narrow, grudging  
3 interpretation of § 1442(a)(1)'" (quoting Arizona v. Manypenny, 451  
4 U.S. 232, 242 (1981)).

5 As the Supreme Court explained in Jefferson County v. Acker,  
6 527 U.S. 423 (1999),

7 It is the general rule that an action may be removed from  
8 state court to federal court only if a federal district court  
9 would have original jurisdiction over the claim in suit. To  
10 remove a case as one falling within federal-question  
11 jurisdiction, the federal question ordinarily must appear on  
12 the face of a properly pleaded complaint; an anticipated or  
13 actual federal defense generally does not qualify a case for  
14 removal. Suits against federal officers are exceptional in  
15 this regard. Under the federal officer removal statute, suits  
16 against federal officers may be removed despite the nonfederal  
17 cast of the complaint.

18 Id. at 430-31 (citations omitted).

19 Thus, the fact that Plaintiffs' complaint expressly disavows  
20 any federal claims is not determinative. Rather, removal is proper  
21 under the federal officer removal statute if the removing party:  
22 (1) demonstrates that it acted under the direction of a federal  
23 officer; (2) raises a colorable federal defense to the plaintiff's  
24 claims; and (3) demonstrates a causal nexus between the plaintiff's  
25 claims and the defendant's acts performed under color of federal  
26 office. Mesa v. California, 489 U.S. 121, 124-25, 134-35 (1989);  
27 Fung v. Abex Corp., 816 F. Supp. 569, 571-72 (N.D. Cal. 1992).

28 Here, Foster Wheeler claims that it is shielded from liability  
by military contractor immunity. This doctrine provides,  
"Liability for design defects in military equipment cannot be  
imposed, pursuant to state law, when (1) the United States approved  
reasonably precise specifications; (2) the equipment conformed to  
those specifications; and (3) the supplier warned the United States

1 about the dangers in the use of the equipment that were known to  
2 the supplier but not to the United States." Boyle v. United  
3 Technologies Corp., 487 U.S. 500, 512 (1988).

4 In the present case, Plaintiffs have expressly disclaimed and  
5 waived any claim arising out of or related to any asbestos exposure  
6 aboard federal jobsites and navy vessels. The Court sees no reason  
7 not to hold Plaintiffs to this waiver; this same waiver language  
8 was found to justify remand in a factually similar case. Westbrook  
9 v. Asbestos Defendants, 2001 WL 902642 (N.D. Cal.). Therefore,  
10 this waiver justifies remand. If Plaintiffs later attempt to  
11 reverse course, and are allowed to do so by the state court despite  
12 their express waiver, Foster Wheeler can file for removal once  
13 again.

14 CONCLUSION

15 For the foregoing reasons, the Court grants Plaintiffs' motion  
16 to remand. The Court shall remand the case back to the Superior  
17 Court for the County of San Francisco. The hearing scheduled for  
18 May 28, 2009 at 2:00 p.m. is vacated.

19 IT IS SO ORDERED.

20  
21 Dated: 5/26/09



22 CLAUDIA WILKEN  
23 United States District Judge  
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