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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DONALD WILLIS and VIOLA WILLIS,
Plaintiffs,
 v.
 BUFFALO PUMPS, INC., et al.
Defendants.

Case No. 12cv744-BTM-DHB

**ORDER DENYING MOTIONS TO
REMAND**

On April 25, 2012, Plaintiffs filed motions to remand in this Court, both under this case number, 12-cv-744-BTM-DHB, and under 12-cv-819-IEG-DHB (ECF Nos. 78 & 82 in 12-cv-744 and ECF Nos. 10 & 14 in 12-cv-819). The cases have since been consolidated.¹ See ECF No. 97.² Since the two motions to remand are virtually identical, the Court addresses both motions together. Oppositions to the motions were filed by defendants Crane Co. (ECF No. 95), VIAD Corp. (ECF No. 103), Foster Wheeler Energy Corp. (ECF No. 106), CBS Corporation (ECF No. 107), Carrier Corp. (ECF No. 108), and Buffalo Pumps, Inc. (ECF No. 109) (collectively, "Defendants"). VIAD Corp. and Carrier Corp. has since been dismissed from the action. See ECF Nos. 177 & 201. For the reasons below, the Court **DENIES** Plaintiffs' motions to remand.

¹Plaintiffs originally filed a single action in state court, but Defendants Viad Corporation and Foster Wheeler Energy Corp. filed separate removals, and each removal was given its own case number in federal court. Plaintiff filed the same set of motions under both case numbers.

²All docket references are to 12-cv-744 except where otherwise noted.

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I. BACKGROUND

Plaintiffs allege that Plaintiff Donald Willis suffers from malignant mesothelioma as a result of his exposure to asbestos while working for the U.S. Navy. Plaintiffs further allege that Defendants manufactured and/or supplied products containing asbestos on the Navy ships on which Mr. Willis worked.

Plaintiffs brought the two actions in state court, but both were timely removed by Defendants pursuant to 28 U.S.C. § 1442(a)(1). Under that provision, an action may be removed to federal court if brought against “[t]he United States or any agency thereof or any officer (or any person acting under that officer) ... for or relating to any act under color of such office...”

II. DISCUSSION

In general, a defendant can only remove a case to federal court if the plaintiff could have brought the action there originally. However, federal officer removal is an exception, whereby “suits against federal officers may be removed despite the nonfederal cast of the complaint” as long as the defense relies on federal law. Jefferson County, Ala. v. Acker, 527 U.S. 423, 431 (1999). Because federal officer removal looks to the defense and not to the complaint, the fact that Plaintiffs have disclaimed “any recovery for injuries caused by the directions or instructions of any federal officer,” Mots. to Remand (ECF No. 78-2 at 3 & ECF No. 82-2 at 3), is irrelevant to whether Defendants have validly removed the action. See Jefferson County, 527 U.S. at 431 (“[T]he federal-question element is met if the defense depends on federal law.”). Other courts in this district have reached the same conclusion. See, e.g., Jenkins v. Allied Packing & Supply, Inc., et al., No. 09-cv-101-DMS-AJB (S.D.Cal. March 25, 2009).

Moreover, “the Supreme Court has mandated a generous interpretation of the federal officer removal statute,” Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1252 (9th Cir. 2006), cautioning the lower courts to avoid a “narrow, grudging interpretation” of the statute where the underlying policy is to ensure that federal officers have ready access to “the

1 protection of a federal forum.” Willingham v. Morgan, 395 U.S. 402, 407 (1969). As the
2 Ninth Circuit concluded in Durham, “when federal officers and their agents are seeking a
3 federal forum, we are to interpret section 1442 broadly in favor of removal.” 445 F.3d at
4 1252. Such agents include government contractors. See Boyle v. United Technologies
5 Corp., 487 U.S. 500, 505-07 (1988).

6 To establish subject matter jurisdiction under § 1442(a)(1), a defendant must show:
7 (a) that it is a “person” within the meaning of the statute; (b) that it was “acting under” the
8 direction of a federal officer with regard to the conduct in question; (c) that there is a causal
9 nexus between plaintiff’s claims and defendant’s conduct “under color of such office”; and
10 (d) that the defendant can assert a colorable federal defense. See Durham v. Lockheed
11 Martin Corp., 445 F.3d 1247, 1251 (9th Cir. 2006). Plaintiffs do not contest that the
12 Defendants are persons within the meaning of the statute.

13 As to the other three elements, it seems clear, both in terms of jurisprudence and
14 analysis, that the most important element is whether Defendants can assert a colorable
15 federal defense. In Mesa v. California, 489 U.S. 121, 129 (1989), the Supreme Court
16 reaffirmed that “federal officer removal must be predicated on the allegation of a colorable
17 federal defense.” And in Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770 (E.D. Pa.
18 2010), one of the MDL cases concerning asbestos product liability, the court concluded that
19 a defendant who satisfies the colorable defense requirement will by extension have met the
20 “acting under” and causal nexus prongs as well. See id. at 784-85.

21 To assert a colorable federal defense as a government contractor in the context of
22 failure to warn claims,³ the defendant must show: “(1) the United States exercised its
23 discretion and approved the warnings, if any; (2) the contractor provided warnings that
24 conformed to the approved warnings; and (3) the contractor warned the United States of the
25 dangers in the equipment’s use about which the contractor knew, but the United States did

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27 ³ While Plaintiffs raise other claims in their complaint, they only discuss the failure to
28 warn claim in their motion to remand. Regardless, “[i]t is well settled that if one claim
cognizable under Section 1442 is present, the entire action is removed... .” Nat’l Audubon
Soc. v. Dep’t of Water & Power of City of Los Angeles, 496 F. Supp. 499, 509 (E.D. Cal.
1980).

1 not.” Getz v. Boeing Co., 654 F.3d 852, 866 (9th Cir. 2011) (citing Oliver v. Oshkosh Truck
2 Corp., 96 F.3d 992, 1003-04 (7th Cir. 1996)) (alteration omitted). As the Ninth Circuit
3 summed it up, “the contractor must demonstrate that the government approved reasonably
4 precise specifications thereby limiting the contractor’s ability to comply with its duty to warn.”
5 Getz, 654 F.3d at 866-67 (internal quotations and alternations omitted).

6 Thus, a defendant who alleges a colorable defense under this standard has also met
7 the “acting under” prong because it must show that the United States actually exercised its
8 discretion with regard to the warnings. The defendant must also meet the casual nexus
9 prong because it must show that the warnings the plaintiff alleges to be deficient conformed
10 to what the United States approved. The third element of the government contractor test
11 further ensures that a contractor may not evade liability by simply keeping the United States
12 in the dark about any dangers of which it was unaware.

13 Plaintiffs argue that government contractors asserting federal officer jurisdiction as
14 grounds for removal bear a “special burden” as private actors. See Williams v. Gen. Elec.
15 Co., 418 F. Supp. 2d 610, 614 (M.D. Pa. 2005) (citing Freiberg v. Swinerton & Walberg
16 Property Svcs., Inc., 245 F.Supp.2d 1144, 1150 (D.Col.2002)). However, this argument
17 does not accord with the case law in this circuit. For instance, in Durham, supra, the
18 removing defendant was a government contractor. In articulating the standard for federal
19 officer removal, the Ninth Circuit did not differentiate between federal agents and private
20 parties acting at the direction of a federal agent. See Durham, 445 F.3d at 1252-53. Thus,
21 the Court finds that Defendants, as government contractors, need not meet any additional
22 burden under that defense.

23 But the government contractor defense is an affirmative one, so Defendants bear the
24 burden of proof. Leite v. Crane Co., 868 F. Supp. 2d 1023, 1030 (D. Haw. 2012) (citing Snell
25 v. Bell Helicopter Textron, Inc., 107 F.3d 744, 746 (9th Cir. 1997)). Nonetheless, at this
26 stage in the proceedings, the defense need only be “colorable.” Id. (citing Mesa v.
27 California, 489 U.S. 121(1989)). Therefore, the question is what evidence a defendant
28 needs to produce to defeat a plaintiff’s motion to remand.

1 As the court noted in Hagen, this issue is at the heart of the split in authority. See 739
2 F. Supp. 2d at 777. Mindful that “[t]he officer need not win his case before he can have it
3 removed,” Willingham, 395 U.S. at 407, the Court adopts the standard laid out by the court
4 in Hagen and holds that “a defendant is entitled to removal under Section 1442(a)(1) where
5 the defendant identifies facts which, viewed in the light most favorable to the defendant,
6 entitle him or her to a complete defense.” Hagen, 739 F. Supp. 2d at 778 (footnote omitted).
7 See also In re: Asbestos Products Liab. Litig. (No. VI), 830 F.Supp.2d 137, 139 (Dec. 13,
8 2011) (citing Hagen as one of the “many substantive and thoughtful rulings” providing “useful
9 guidance” for non-MDL courts with asbestos actions); Leite v. Crane Co., 868 F. Supp. 2d
10 1023, 1030-31 & 1038 (D. Haw. 2012) (drawing on the Hagen standard).

11 As in Hagen, the Court finds Defendants’ proffered evidence to “plainly satisfy this
12 standard.”⁴ 739 F. Supp. 2d at 778. The affidavits and exhibits submitted by Defendants
13 – including Navy product specifications, correspondence between the contractors and the
14 Navy as to the specifications, and sworn statements by naval officers with extensive
15 experience in engineering and inspection – amply demonstrate the Navy’s “reasonably
16 precise specifications.” The exhibits make clear that, per the colorable defense test, the
17 Navy exercised its discretion well beyond the bare minimum, and that the contractor’s
18 products must have conformed to what the Navy approved or else they would have been
19 rejected. See, e.g., Decl. of Roger B. Horne, Jr. (“Horne Decl.”) (ECF No. 110-3) at ¶ 22;
20 Decl. of Martin K. Kraft (ECF No. 110-9) at ¶ 14. The exhibits further show that the Navy had
21 state-of-the-art knowledge regarding the dangers of asbestos, see, e.g., Horne Decl. at ¶ 16,
22 and thus that there were no dangers about which the contractors knew but the Navy did not.

23 Plaintiff argues that the Ninth Circuit’s opinions in Butler v. Ingalls Shipbuilding, Inc.,
24 89 F.3d 582 (9th Cir. 1996) and In re Hawaii Fed. Asbestos Cases, 960 F.2d 806 (9th Cir.
25 1992) means that the defendants must show that the Navy either told them they could not
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27 ⁴ Because the Court views the evidence in the light most favorable to the defendants
28 at this stage in the litigation, Plaintiffs’ evidentiary objections are overruled. However, the
Court refers to the evidence submitted by the Defendant for the limited purpose of the
motion to remand, without making any finding as to their credibility or weight.

1 provide warnings at all or dictated the exact wording of any such warnings. However, this
2 has been refuted outright by the Ninth Circuit in Getz v. Boeing Co., 654 F.3d 852, 867 (9th
3 Cir. 2011), in which it stated:

4 We are not persuaded by Plaintiffs' suggestion that our
5 decisions in Butler and Hawaii Federal Asbestos limit the
6 defense to cases in which the government specifically forbids
7 warnings altogether or to instances where the government
8 explicitly dictates the content of the warnings adopted. These
9 cases only require that governmental approval (or disapproval)
10 of particular warnings "conflict" with the contractor's "duty to
11 warn under state law." To read these cases as limiting
12 preemption to those instances where the government forbids
13 additional warning or dictates the precise contents of a warning
14 would be inconsistent with the Court's decision in Boyle. **Boyle**
15 **makes clear that government discretion, rather than**
16 **dictation, is the standard. Accordingly, given that the Army**
17 **considered, reviewed, and determined which warnings to**
18 **provide, the government's exercise of discretion**
19 **necessarily "conflicts" with the Contractors' "duty to warn**
20 **under state law."**

21 Id. at 867 (citations omitted; emphasis added). The evidence submitted by Defendants
22 indicates that "[a]ny warning purportedly required by state law would not have found its way
23 into a ship... unless it had been required specifically in the specifications for the product that
24 were issued by the Navy." Horne Decl. at ¶ 15.

25 Under the standard in Getz, it seems clear that the Navy exercised its discretion to
26 the extent required to apply the federal contractor defense, and that Defendants otherwise
27 meet the standard for presenting a colorable federal defense. Defendants have offered
28 numerous affidavits of people with extensive experience with government contracts for the
Navy, on both the Navy and contractor side, who state that "[t]he U.S. Navy had complete
control over every aspect of every piece of equipment ... includ[ing] which warnings should
or should not be included." Affidavit of Admiral Ben J. Lehman at ¶ 10 (ECF No. 106, Ex.
6). See also Affidavit of J. Thomas Schroppe at ¶ 22 (ECF No. 106, Ex. 4) (noting that due
to the Navy's detailed practices and procedures, "Foster Wheeler would not be permitted...to
affix any type or warning or caution statement... beyond those required by the Navy.").
Defendants have also offered specific examples of the Navy's comprehensive specifications,
both in terms of the design and any accompanying notices. See, e.g., Def. Crane Co.'s

1 Notice of Joinder in Removal, Ex. 1 at 15 (ECF No. 4-1 at 66) (military specifications
2 requiring a caution for packaging and packing and dictating said warning). The evidence
3 offered is indistinguishable from the myriad other asbestos cases in which Defendants have
4 been involved where the court similarly denied the motion to remand. See, e.g., Machnik
5 v. Buffalo Pumps Inc., 506 F. Supp. 2d 99 (D. Conn. 2007); Carroll v. Buffalo Pumps, Inc.,
6 3:08-CV-707(WWE), 2008 WL 4793725 (D. Conn. Oct. 27, 2008).

7 Since the Court holds that the defendants have alleged a colorable federal defense,
8 these cases were properly removed. Therefore, the Court **DENIES** Plaintiffs' motions to
9 remand.

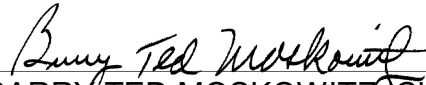
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III. CONCLUSION

For the reasons above, the Court **DENIES** Plaintiffs' motions to remand (ECF Nos.
78 & 82 in 12-cv-744, and ECF Nos. 10 & 14 in 12-cv-819).

IT IS SO ORDERED.

DATED: March 29, 2013


BARRY TED MOSKOWITZ, Chief Judge
United States District Court