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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DALE M. SPURLIN and
MARY SPURLIN,

Plaintiffs

v.

AIR & LIQUID SYSTEMS
CORPORATION, et al.,

Defendants

Case No.: 19-cv-02049-AJB-AHG

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER
JURISDICTION**

(Doc. No. 181.)

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1 Before the Court is a joint motion to dismiss for lack of subject matter jurisdiction
2 filed by Warren Pumps, LLC,¹ Foster Wheeler Energy Corporation and Foster Wheeler
3 LLC (collectively “Foster Wheeler”), IMO Industries, Inc. (“IMO”), and Crane Co.
4 (“Crane”) (collectively, “Defendants”).² (Doc. No. 181.) Defendants seek dismissal
5 pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(1), arguing that the Court lacks
6 jurisdiction over this case because they are entitled to “derivative sovereign immunity”
7 pursuant to *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18 (1940). For the reasons set forth
8 below, the Court **DENIES** Defendants’ motion.

9 **I. BACKGROUND**

10 This is a maritime tort case concerning Dale M. Spurlin’s (“Mr. Spurlin”) alleged
11 exposure to asbestos-containing equipment during his service in the United States Navy
12 from 1963 to 1969. Mr. Spurlin contends that his exposure to asbestos while aboard two
13 Navy ships caused him to develop mesothelioma. Mr. Spurlin and his wife Mary Spurlin
14 (collectively, “Plaintiffs”) sued various equipment manufacturers with which the Navy
15 contracted, claiming that the manufacturers are liable for their injuries.

16 Mr. Spurlin served in the U.S. Navy from 1963 to 1969 and was aboard two naval
17 ships, the *USS McGinty* and the *USS Rowan*. While on reserve duty, he spent one weekend
18 a month on the *McGinty*, plus an 18-day cruise. Then, while on active duty from December
19 1964 through October 1966, Mr. Spurlin spent approximately two years straight on the
20 *Rowan*. Mr. Spurlin was a boiler tender. He operated and maintained the boilers and related
21 equipment in the fire rooms. Plaintiffs bring this action against Defendants, asserting that
22 Mr. Spurlin’s mesothelioma was caused by exposure to asbestos from, among other
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24 ¹ The Court notes that on October 8, 2021, Plaintiffs filed a notice of settlement as to Defendant Warren
25 Pumps, LLC, and the settlement disposition conference is scheduled for November 16, 2021. (Doc. Nos.
26 190, 191.) In addition, the parties previously represented that a notice of settlement will be filed as to
27 Defendant Air & Liquid Systems Corporation, but none has been filed.

28 ² It does not appear that Defendant Clarke Reliance joined the instant motion to dismiss. The preamble to
Defendants’ opening and reply briefs name the defendants who have brought the motion, but do not
mention Clarke Reliance.

1 sources, asbestos-containing insulation, gaskets, and packing associated with handling
2 Defendants' products during his service in the Navy.

3 **II. ANALYSIS**

4 More than two years into litigation and after resolution of the parties' exhaustive
5 cross-motions for summary judgment, Defendants now bring a Rule 12(b)(1) motion to
6 dismiss claiming that the Court lacks subject matter jurisdiction over this case. (Doc. No.
7 181.) In support of their motion, Defendants argue that they are entitled to derivative
8 sovereign immunity pursuant to *Yearsley*, which they contend is a jurisdictional bar
9 warranting dismissal of Plaintiffs' claims. The Court disagrees.

10 **A. *Yearsley* Immunity is Not a Jurisdictional Bar**

11 To begin, the Court finds that *Yearsley* immunity is not a jurisdictional bar, but
12 rather, an affirmative defense against the merits of Plaintiffs' claims. The Court
13 acknowledges that there is a circuit split on whether *Yearsley* immunity is jurisdictional. In
14 *Adkisson v. Jacobs Eng'g Grp., Inc.*, the Sixth Circuit noted the split between the Fourth
15 and Fifth Circuits on this issue and ultimately sided with the Fifth Circuit, concluding that
16 "*Yearsley* is not jurisdictional in nature." 790 F.3d 641, 646–47 (6th Cir. 2015). Upon
17 review of the parties' arguments and case law presented, the Court agrees with the Fifth
18 and Sixth Circuits' conclusion.³

19 By way of background, *Yearsley* involved a landowner's claim for damages against
20 a private company whose work improving the navigation of the Missouri River, pursuant
21 to its contract with the Federal Government, eroded part of the plaintiff's land. *See* 309
22 U.S. at 19. The *Yearsley* court noted that it was "undisputed that the work which the
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24 ³ Neither party identified binding authority on this issue, and the Court is aware of none. Additionally,
25 because the Fourth Circuit did not elaborate on its conclusion that *Yearsley* immunity is jurisdictional, the
26 Court declines to rely on it. *See Adkisson*, 790 F.3d at 646 ("The Fourth Circuit has held, albeit without
27 elaboration, that the bar is indeed jurisdictional.") (citing *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466
28 (4th Cir. 2000)). Lastly, the Court is unpersuaded by Defendants' argument that a recent Fifth Circuit
decision supports the conclusion that *Yearsley* is jurisdictional because the case they cited expressly states
that "*Yearsley* immunity is an affirmative defense, and Couvillion bore the burden of proof on the defense
at trial." *Taylor Energy Co., L.L.C. v. Luttrell*, 3 F.4th 172, 175 (5th Cir. 2021).

1 contractor had done in the river bed was all authorized and directed by the Government of
2 the United States” and “performed pursuant to the Act of Congress.” *Id.* at 20. Under these
3 facts, the Supreme Court explained that where the Government’s “authority to carry out
4 the project was validly conferred, that is, if what was done was within the constitutional
5 power of Congress, there is no liability on the part of the contractor for executing its will.”
6 *Id.* at 20–21. Accordingly, the *Yearsley* court held that the contractor was not liable to the
7 landowner.

8 As to whether the immunity contemplated in *Yearsley* is jurisdictional in nature, the
9 Court observes that *Yearsley* made no apparent mention of jurisdiction or otherwise address
10 the court’s authority to hear the case. What is apparent, however, is that the immunity
11 flowed from a finding that the contractor was acting as an agent or officer of the
12 Government. And because the undisputed facts in *Yearsley* established that the contract
13 was validly conferred and the contractor did not exceed his authority thereunder, the
14 contractor could not be found liable. *See id.* at 21 (“Where an agent or officer of the
15 Government purporting to act on its behalf has been held to be liable for his conduct
16 causing injury to another, the ground of liability has been found to be either that he
17 exceeded his authority or that it was not validly conferred.”) The agency and limiting
18 principles at play in *Yearsley* therefore suggest that the immunity is akin to qualified
19 immunity, which is “an affirmative defense that should be pled by the defendant.”
20 *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993). The Sixth Circuit in *Adkisson*
21 concluded the same: “*Yearsley* immunity is, in our opinion, closer in nature to qualified
22 immunity for private individuals under government contract, which is an issue to be
23 reviewed on the merits rather than for jurisdiction.” 790 F.3d at 647 (citing *Filarsky v.*
24 *Delia*, 566 U.S. 377, 394 (2012)).

25 Additionally supportive, in *Campbell-Ewald Co. v. Gomez*, the Supreme Court
26 considered the question: “Do federal contractors share the Government’s unqualified
27 immunity from liability and litigation?” and answered: “they do not.” 577 U.S. 153, 166
28 (2016). Indeed, the Supreme Court appeared to criticize Campbell’s assertion of a so-called

1 “derivative sovereign immunity,” stating that he could “offer no authority for the notion
2 that private persons performing Government work acquire the Government’s embracive
3 immunity.” *Id.* The *Campbell* court explained that while government contractors obtain
4 certain immunity in work performed pursuant to their contracts with the United States,
5 “[t]hat immunity, however, unlike the sovereign’s, is not absolute.” *Id.* This reflects that
6 private companies do not gain blanket protection from suit, simply by contracting with the
7 United States, but may be protected from liability under a *Yearsley* affirmative defense,
8 much like qualified immunity, depending on the circumstances of a case. *See id.* at 156
9 (“We hold that the petitioner’s status as a Government contractor does not entitle it to
10 ‘derivative sovereign immunity,’ *i.e.*, the blanket immunity enjoyed by the sovereign.”).
11 The Supreme Court’s discussion of *Yearsley* is consistent with that of the Sixth Circuit.

12 Also instructive here, when the Supreme Court considered the contractor’s asserted
13 *Yearsley* immunity, it did not—as Defendants here would have this Court do—review the
14 case for subject matter jurisdiction under Rule 12(b)(1). Rather, the *Campbell* court
15 reviewed the merits of the contractor’s defense under Rule 56. Indeed, nowhere in
16 *Campbell*’s discussion of *Yearsley* does the Supreme Court make any reference to subject
17 matter jurisdiction. The Court finds this omission telling because courts, including the
18 Supreme Court, “have an independent obligation to determine whether subject-matter
19 jurisdiction exists, even in the absence of a challenge from any party.” *Arbaugh v. Y&H*
20 *Corp.*, 546 U.S. 500, 514 (2006). As such, the Supreme Court’s application of the Rule 56
21 standard, as opposed to the Rule 12(b)(1) standard, further supports the finding that
22 *Yearsley* immunity is an affirmative defense for which Defendants bear the burden of
23 proving at trial. *See Campbell-Ewald Co.*, 577 U.S. at 168 (reviewing the merits of
24 *Campbell*’s *Yearsley* immunity claim and stating that “[a]t the pretrial stage of litigation,
25 we construe the record in a light favorable to the party seeking to avoid summary
26 disposition”).

27 For the foregoing reasons, the Court disagrees with Defendants and finds that their
28 claim to *Yearsley* immunity does not implicate the Court’s subject matter jurisdiction, but

1 rather, is an affirmative defense for which they bear the burden of proving. Accordingly,
2 the Court **DENIES** Defendants’ Rule 12(b)(1) motion on that basis.

3 **B. Defendants Are Not Entitled to *Yearsley* Immunity**

4 Even assuming that Defendants timely brought a motion for summary judgment on
5 their *Yearsley* defense (they did not), the Court finds that they are not entitled to summary
6 adjudication based on *Yearsley*. The Ninth Circuit has explained that this immunity “is
7 limited to cases in which a contractor ‘had no discretion in the design process and
8 completely followed government specifications.’” *Cabalce v. Thomas E. Blanchard &*
9 *Assocs., Inc.*, 797 F.3d 720, 732 (9th Cir. 2015) (citation omitted). The Supreme Court
10 reiterated this in *Campbell* when it noted that “the contractor’s performance in compliance
11 with all federal directions” was “[c]ritical in *Yearsley*.” *Campbell-Ewald Co.*, 577 U.S. at
12 167 n.7. “Crucial, then, to a *Yearsley* analysis is not merely the existence of a government
13 contract, but whether the government contractor met the ‘explicit instructions’ it received
14 from the government and did not overstep federal law while acting on those instructions.”
15 *Pizarro v. Nat’l Steel & Shipbuilding Co.*, No. C 19-08425 WHA, 2021 WL 1197467, at
16 *1 (N.D. Cal. Mar. 30, 2021).

17 As did the Supreme Court in *Campbell*, the Court applies Rule 56 and “construe[s]
18 the record in a light favorable to the party seeking to avoid summary disposition,” in this
19 case, Plaintiffs. Upon review of the parties’ evidence, the Court finds that there is a lack of
20 evidence that Defendants’ failure to warn against asbestos can be attributed to their
21 compliance with federal directions concerning the installation and repair of their
22 asbestos-containing equipment. *See Campbell-Ewald Co.*, 577 U.S. at 167 n.7; *Cabalce*,
23 797 F.3d at 732. The record shows no government direction preventing Defendants from
24 warning against asbestos hazards.

25 Plaintiffs’ naval expert, Captain Arnold Moore, detailed in his report that General
26 Specifications for Machinery “required manufacturers to provide installation, operation
27 and maintenance instructions as well as ‘safety precautions’ as an essential part of
28 Instruction Books for machinery and electrical equipment.” (Doc. No. 185-16 at 24.) These

1 specifications “are the basis of all special specifications, form part of all machinery
2 contracts, and the practice set forth therein shall govern in all cases unless modified or
3 excepted by the special specifications issued in each individual case.” (*Id.*)

4 In the 1960s, when Mr. Spurlin served in the Navy, Military Specification
5 MIL-M-15071D, dated June 6, 1961, stated that “‘WARNINGS’ are clearly required for:
6 ‘operating procedures, practices etc. which will result in personal injury or loss of life if
7 not correctly followed.’” (*Id.* at 25.) The 1962 edition of this specification maintained the
8 previous warning requirements and added a requirement that installation instructions must
9 include safety precautions during equipment unpacking and installation, as well as a
10 requirement that repair instructions must include “any cautions or warning which must be
11 observed to protect personnel and equipment.” (*Id.* (internal quotations omitted).) The
12 August 1967 version of the specifications contained essentially the same safety
13 requirements. (*Id.*)

14 Based on this information and his experience supervising the preparation of Naval
15 equipment technical manuals and reviewing the specifications with Navy officials and
16 employees, Captain Moore opined that “[t]he Navy relied heavily upon its equipment
17 manufacturers to identify hazards associated with their products. The hazards associated
18 with exposure to asbestos and asbestos containing materials and equipment were not
19 exempt.” (*Id.* at 23.) The evidence therefore reveals that Defendants did not completely
20 lack discretion over its product warnings and that the lack of asbestos-related warnings—
21 the alleged injury-causing condition—was not mandated by any specific government
22 instruction. Defendants therefore cannot claim compliance with its government contract to
23 shield itself from liability in this case.

24 The Court finds that *Yearsley* is distinguishable because the act giving rise to the
25 plaintiff’s injury in that case “was all authorized and directed by the Government of the
26 United States.” 309 U.S. at 20. The same cannot be said in this case. Here, there is no
27 evidence that the failure to warn about asbestos was expressly authorized and directed by
28 the United States. Indeed, the General Specifications for Machinery states, “The Bureau’s

1 approval of any type of plan shall not relieve a contractor of any material or performance
2 obligation under the contract, [e.g., inclusion of warnings and safety precautions in
3 manuals] unless a question in regard thereto has been brought to the Bureau's attention in
4 writing, and specific waiver of such requirement by the Bureaus has been obtained." (Doc.
5 No. 181-6 at 129). Although there was a process by which the Navy could have modified
6 or excepted a particular warning or safety precaution, Defendants presented no evidence
7 of government instructions or special exceptions that precluded or prohibited them from
8 providing asbestos-related warnings for their products.⁴ On the contrary, as Captain Moore
9 reported, the Navy authorized manufacturers to include health and safety warnings in the
10 equipment manuals and relied heavily on Defendants to identify hazards associated with
11 their products. (Doc. No. 185-16 at 23.)

12 As such, the Court finds this case more analogous to *Campbell*, where the Navy
13 authorized and instructed Campbell to send text messages only to individuals who opted in
14 to receive marketing solicitations and relied on Campbell's representation that the message
15 recipient list contained only those who consented. *See* 577 U.S. at 168. The Navy's
16 recruiting messages, however, were sent to unconsenting recipients in violation of the
17 Telephone Consumer Protection Act. *See id.* Upon review of the evidence, the Supreme
18 Court held that Campbell was not entitled *Yearsley* immunity because the record revealed
19 no basis to find that he complied with the Navy's explicit instructions. *See id.* Messaging
20 unconsenting recipients could not be attributed to a government instruction. *See id.*

21 Similarly, here, Defendants' failure to warn about asbestos hazards cannot be
22 attributed to any specific government instruction. There being no government instruction
23 expressly prohibiting Defendants from providing asbestos-related health warnings, the
24 Court finds that Defendants' liability for failing to warn Mr. Spurlin of the dangers of
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27 ⁴ Defendants argue that Captain Moore conceded that the Navy did not require asbestos warnings in
28 instruction manuals, but this argument is unavailing. The Court declines to construe the approval of a plan
that does not require asbestos warnings to equate to one that prevents them, especially where the Navy
relied on manufacturers to identify hazards associated with their products.

1 asbestos did not arise from full compliance with their government contract duties. Again,
2 the Court highlights that the Navy authorized manufacturers to provide warnings and relied
3 heavily on them to identify hazards associated with their products. Affording Defendants
4 immunity under these circumstances would therefore seem to unfairly reward Defendants
5 for their lack of due diligence in identifying and including warnings that the Navy relied
6 on them to provide. Construing *Yearsley* in this way would appear to produce absurd
7 results.


8 Accordingly, based on the foregoing, the Court finds that *Yearsley* does not protect
9 Defendants from liability in this case, and thus, they are not entitled to summary
10 adjudication on that basis.

11 **III. CONCLUSION**

12 For the reasons stated, the Court **DENIES** Defendants' motion to dismiss for lack
13 of subject matter jurisdiction.

14 **IT IS SO ORDERED.**

15 Dated: October 21, 2021

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17 Hon. Anthony J. Battaglia
18 United States District Judge
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