

05-1820-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT



In Re:
“Agent Orange”
Products Liability Litigation

JOE ISAACSON and PHYLLIS LISA ISAACSON,

Plaintiffs-Appellants,

v.

DOW CHEMICAL CO., MONSANTO CO., HERCULES INC., OCCIDENTAL CHEMICAL CORP.,
ULTRAMAR DIAMOND SHAMROCK CORPORATION, MAXUS ENERGY CORP., CHEMICAL
LAND HOLDINGS, INC., T-H AGRICULTURE & NUTRITION CO., THOMPSON-HAYWARD
CHEMICAL CO., HARCROS CHEMICAL, UNIROYAL, INC., C.D.U. HOLDING INC. and
UNIROYAL CHEMICAL COMPANY,

Defendants-Appellees.

*On Appeal from the United States District Court
for the Eastern District of New York*

FINAL BRIEF FOR PLAINTIFFS-APPELLANTS

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I. JURISDICTIONAL STATEMENT

Appellants appeal from final judgments entered by the United States District Court for the Eastern District of New York, in which the court denied remand and entered summary judgment in favor of Appellees; therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1291. The notice of appeal, filed March 31, 2005, was timely. However, the subject matter jurisdiction of the district court is one of the disputed issues raised by this appeal. Appellees contend that jurisdiction is proper pursuant to the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1). Appellants contend that Appellees have not met their burden of establishing federal officer removal pursuant to § 1442(a)(1) and that this action should therefore be remanded to New Jersey state court.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Were Appellees “acting under color of federal office” within the meaning of 28 U.S.C. §1442(a)(1) when they produced off-the-shelf herbicides contaminated with high levels of dioxin which was not specified in any contract but rather produced as a result of defective manufacturing processes that were entirely within the Appellees control?
2. Is the government contractor ‘defense,’ which can never be asserted by a

federal official but is reserved for private contractors and more often described as a liability standard than a defense, the type of “colorable federal defense” contemplated for purposes of removal under 28 U.S.C. §1442(a)(1)?

3. Are the Appellants, corporate manufacturers of Agent Orange, “persons” within the meaning of 28 U.S.C. § 1442(a)(1)?
4. Could reasonable minds differ about whether manufacturers have satisfied the first prong of the government contractor defense when: 1) Appellees sold the government the same herbicides they were routinely selling commercially; 2) the specifications for the herbicides did not mention or consider the toxic contaminant, dioxin, which is at issue in this litigation; or 3) the high levels of the toxic contaminant, dioxin, which were sold to the government as an unwanted part of the product resulted from defective manufacturing processes that Appellees selected and controlled?
5. Could reasonable minds differ about whether manufacturers can satisfy the third prong of the government contractor defense, requiring warnings of hazards in the product when: 1) Appellants have shown that the manufacturers had substantial knowledge about the toxicity of their product which they did not share with the government; 2) the actual government personnel involved in selecting Appellants’ products and writing the contract specifications had

no knowledge regarding the products' defects; or 3) Appellants seek to be relieved of their obligation to warn the government personnel actually involved in the contracting and specification process because of fragmentary knowledge of government personnel working on unrelated projects in far-flung departments.

6. Did the lower court err by limiting plaintiffs' discovery to the review of MDL litigation files more than 20 years old, and precluding them from taking meaningful discovery into substantial subsequent litigation involving the same issues and the same defendants, particularly when that litigation primarily concerned Appellants' knowledge of the toxicity of their herbicides and their dioxin contaminant?

III. STATEMENT OF FACTS

Joe Isaacson enlisted in the Air Force and served in Vietnam where he was a crew chief at one of the airfields from which planes took off to spray Defendants' herbicides, including "Agent Orange." He was in regular contact with herbicides while he was in Vietnam. In 1996, Isaacson was diagnosed with non-Hodgkins lymphoma, a disease strongly linked to exposure to dioxin, an unwanted contaminant of Defendants' herbicides.

Isaacson filed suit against Defendants, based upon theories of negligence and product liability, alleging that Defendants' dioxin contamination of their product and their negligence in not using the state of the art technology in their manufacturing process unnecessarily resulted in his exposure to Defendants' herbicides which were highly contaminated with dioxin. This dioxin contamination was not mentioned in any government specifications. Isaacson Complaint, A12203-12219. These allegations are supported by voluminous evidence, summarized in two briefs below, a 173 page brief, A7011-A7184, and a 147 page brief, A7795-A7941.

IV. STATEMENT OF THE CASE

Plaintiff Joe Isaacson is a United States Air Force veteran who served in Vietnam from 1968 through 1969 where he was exposed to Agent Orange herbicides manufactured by Defendants in part while he was a crew chief at one of the airfields from which Operation Ranch Hand flew. In 1996, Mr. Isaacson was diagnosed with non-Hodgkin's Lymphoma, a rare cancer generally agreed to be caused by exposure to dioxin.

In July 1998, Mr. Isaacson and his wife filed suit in the New Jersey Superior Court in Ocean County, asserting against Defendants a series of state-based claims, including negligence, strict products liability and breach of warranty. Plaintiffs pled

no federal causes of action.

In August 1998, Defendants removed the action to the United States District Court for the District of New Jersey. In September 1998, Plaintiffs filed a Motion to Remand. Among their many bases for removal, Defendants responded that removal jurisdiction was proper both under the All Writs Act, 28 U.S.C. §1651 and the Federal Officer Removal Statute. By Order dated December 7, 1998, the New Jersey District Court held that federal jurisdiction was proper under the All Writs Act. However, the court did not reach Defendants' §1442 arguments. A13201-A13208.

In October 1999 Defendants moved to dismiss the claims of Joe Isaacson and his wife under F.R.C.P.12(b)(6), asserting that they were barred by a 1984 class action settlement and subsequent final judgment purporting to resolve all Agent Orange claims of veterans stemming from Vietnam herbicide exposure. In December 1999, the District Court, per Judge Weinstein, granted Defendants' motion from the bench, finding that plaintiffs' claims were an impermissible collateral attack on the 1984 settlement he had approved, rejecting plaintiffs' arguments that they were inadequately represented by the class.

By Order dated November 30, 2001, this Court vacated the District Court's dismissal, holding that plaintiffs – whose injuries first manifested after the termination of the class settlement fund in 1994 – were inadequately represented by

the class. As a result, their claims were not barred by *res judicata*. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2nd Cir. 2001).

The Supreme Court of the United States granted Defendants' Petition for Writ of Certiorari. By Order dated June 9, 2003, the Supreme Court affirmed the Second Circuit's judgment. *Dow Chemical Company v. Stephenson*, 539 U.S. 111, 156 L.Ed.2d 106 that the Plaintiffs' cases were not extinguished by the prior class settlement. However, the Supreme Court reversed this Court as to whether removal was proper pursuant to the All Writs Act. A13382. By order dated September 29, 2003, this court vacated its holding with respect to All Writs Act jurisdiction and remanded the Isaacson case back to the District Court to determine whether, absent jurisdiction under the All Writs Act, there were alternate grounds to support federal jurisdiction. *Stephenson v. Dow Chemical Co.*, 346 F. 3d 19 (2d Cir. 2003).

Shortly after the case was transferred back to the District Court, between November 10 through November 15, 2003, Defendants filed their "Motions for Summary Judgment based on the Government Contractor Defense, along with supporting Affidavits, Exhibits and Memoranda" which totaled thousands of pages.

On December 19, 2003, Shortly before the filing of Plaintiff's opposition papers to Defendants' Summary Judgment Motion, Judge Weinstein issued an order posing four questions relating to the government contractor defense for the parties to

respond to through briefs and supporting documents. A13449-13450, A13452-13470, A13471-13484, A13485-13510. However, neither these questions nor their responses were referenced in the court's subsequent February 9, 2004 order.

On January 8, 2004, Plaintiffs filed their initial opposition papers to Defendants' Motion for Summary Judgment. Like Defendants' filings, these filings comprised several thousand pages. On the same date, plaintiff also filed a Motion to Strike numerous defense exhibits on the grounds that they did not fall under any recognized exception to the hearsay rule or they were otherwise not admissible into evidence.

On January 22, 2004, shortly before the Monday, January 26 hearing, Defendants began the process of submitting additional affidavits and exhibits in support of their Summary Judgment Motion, again comprising thousands of pages. Some of this material was not served until Saturday, January 24, 2004. Plaintiffs' counsel received none of the material, having already departed from California before the materials arrived at his office. Transcript of 1/26/04 Hearing at A11567-A11569. Judge Weinstein also stated that all parties could supplement the record until 8:00 a.m. on the morning of 1/26/04, two hours before the oral argument on all of the motions. In response to Plaintiffs' objections and request to continue the hearing, Judge Weinstein permitted Plaintiffs' to file additional documents with a new

deadline of February 6, 2004. *Id.* at A11594.

On Friday, February 6, 2004, Plaintiffs filed several thousand pages of additional documents in opposition to Defendants' motions. These included an affidavit from Dr. Janet Weiss, an expert in workplace toxicology, A3967-A3980, and a second affidavit from Dr. Harry Ensley, A3953-A3966, a professor of chemistry, along with extensive briefing.

On Monday morning February 9, 2004, Judge Weinstein issued four opinions. Plaintiffs motion to strike was denied with a one page order, stating only that "no prejudice has been shown." An opinion was issued reversing his own opinion in *Ryan v. Dow Chemical*, 781 F.Supp. 934 (E.D.N.Y. 1982), denying remand. Finally, a lengthy opinion granting summary judgment in favor of Defendants was issued. Fully half of the discussion in *In re "Agent Orange" Product Liability Litigation*, 304 F. Supp. 2d 404 (E.D.N.Y. 2004) is dedicated to the history of the prior settlement, matters wholly irrelevant to issues before the court. The opinion only discusses the conduct of one of the Defendants, Diamond, while it completely ignores all of Plaintiffs' filings and fails to mention any of the expert affidavits filed by plaintiffs. While stating that "normally a court will postpone decision on a summary judgment until the completion of discovery, *Id.* at *10, Judge Weinstein took the extraordinary step of entering a summary judgment decision anyway and then staying the effect of

it by explaining:

[a]t the hearing on this motion to dismiss, plaintiffs explained their failure to adequately respond by noting difficulties in obtaining evidence for their position. This problem is understandable since the events at issue occurred forty or more years ago. Plaintiffs have asked for an additional six months for discovery. *See* Part I, *supra*.

To ensure due process, this decision is stayed until October 12, 2004. Discovery on the issues posed by the government contractor defense may continue to August 10, 2004. Plaintiffs may make a motion to reconsider by filing papers on or before September 10, 2004. If made, the motion will be heard on October 10, 2004.

Id. at 441.

On February 20, 2004, Plaintiffs moved to amend and certify the court's order denying remand and to stay discovery pending appeal. A13214-13242. The court denied Plaintiffs' motion on March 3, 2004.

Between February and October 2004, most of the activity in the case centered on discovery. On November 10, 2003, plaintiff had served Interrogatories and Requests to Produce Documents on defendants. Many of these documents were originally requested by letter dated October 24, 2002. A11393-A11395. On December 22, 2003, Defendants Dow and Monsanto served blanket objections to all of plaintiffs' discovery requests. Between January 2003 and October 2003 Plaintiffs made numerous requests for non-MDL 351 discovery. In response, the Court ordered the Agent Orange files returned from the National Archives back to the

Eastern District in order to give Plaintiffs an opportunity to review them. As to non-MDL discovery, however, Magistrate Azrack rejected every request. (Transcript of Hearing before Azrack, A11420-11483))

On only one occasion was plaintiff successful in getting the court to overrule any decision on discovery. Given the fact that in their January filings, Defendant Hercules had included material from the case of *United States v. Vertac Chemical Corp.*, 841 F. Supp. 884 (E.D. Ark. 1993), *aff'd*, 46 F.3d 803 (8th Cir. 1995), *cert. denied sub nom., Hercules, Inc. v. United States*, 515 U.S. 1158 (1995), Plaintiffs asked to receive all of the deposition and trial testimony in that case. Defendant Hercules objected and Judge Azrack denied the request for discovery along with every other request for non-MDL discovery presented to her. AA11246-11276. Plaintiffs took the matter to the trial court (A11277-A11282) and were granted a limit of six depositions by Judge Weinstein. Order of March 19, 2003, A11333-A11337.

Every other request that Plaintiffs made for discovery was denied. These included requests for the transcripts from the *United States v. Vertac* matter referenced above. See: letters from Mark Cuker dated January 20, 2004, (AA11127-11128), January 27, 2004, (A11138-11140), March 1, 2004, (A11241-A11243), May 5, 2004, (A11350-A11359), June 17, 2004, (A11361); letters from Gerson Smoger, dated June 23, 2004 (A11362-A11363), July 26, 2004 (A11366-A11371), and August 12, 2004 with

Exhibits A-F (A11372-A11413); and the transcript of the hearing before Magistrate Azrack on Aug. 16, 2004, A11420-A11482.

On October 5, 2004, Judge Weinstein was asked by Plaintiffs' counsel Gerson Smoger to hold a hearing on discovery. A conference was ordered with Judge Weinstein writing on the margin: "this case should be disposed of as promptly as possible." See A3988. Afterwards, Judge Weinstein denied the Motion by Plaintiffs to obtain additional deposition transcripts. A3992-A3993.

On November 3, 2004, Plaintiffs filed their Motion for Reconsideration of Rulings Granting Summary Judgment, supplementing the Motion with an Affidavit prepared by Ralph Nash. A6989-A7000. These submissions totaled several thousand pages, including a brief which separates out, one by one, all 103 factual statements made by the trial court in its February 9, 2004, decision and then expressly denies with factual support the vast majority of the trial court's statements as if the trial court was presenting a statement of uncontested facts. A7795-A7941.

Shortly after receiving Plaintiff's Motion for Reconsideration, on November 16, 2004, Judge Weinstein cancelled the scheduled hearing, told the Defendants that they need not respond to Plaintiffs' filings, and dismissed the cases of Plaintiffs Stephenson and Isaacson. See 344 F. Supp. 2d 873. The November 16, 2004, order incorrectly stated that "Plaintiffs requested a stay of the judgment so they could

conduct further discovery,” *id.*, when, in actuality, Plaintiffs had requested a stay of the summary judgment hearing to conduct discovery before the Court rendered a decision. Additionally, in its November order, the trial court noted that its decision to grant summary judgment by stating that all manufacturers were the same as Diamond, 344 F. Supp. 2d 873, 874 (EDNY 2004) was incorrect: “[Plaintiffs’] documents establish that not all defendants had identical procurement contracts, knowledge of the dangers of contamination with dioxin of the various herbicides they supplied to the government ...” Nevertheless, Judge Weinstein ordered the stay lifted and told the Defendants to “submit a specific judgment in favor of each named defendant against each named plaintiff whose claims arose from service in the” military. *Id.* at 875.

On December 2, 2004, Judge Weinstein denied another plaintiffs’ request for discovery, indicating that he would review papers in opposition to Defendants’ summary judgment from any plaintiff whose claims arose from Agent Orange exposure in Vietnam if they were filed by December 10, 2004, and that “no further extensions will be granted”. A7004-A7010. Yet, on December 7, 2004, Judge Weinstein reimposed the stay on his summary judgment and ruled that he would review papers in opposition to Defendants’ summary judgment motion if filed by January 17, 2005, though the ruling was not mailed out by the court until January 26,

2005, so Plaintiffs could not take advantage of the additional time. A13245. On February 28, 2005, Plaintiffs filed a reply and supporting affidavits to rebut Defendants' response to their Amended Motion for Reconsideration. e.g. A10347-A10358, after their request for a continuance was denied. A10338. On February 28, 2005, oral argument was held on the Motion for Reconsideration and the issue of the Federal Officer Removal Statute. *See* A11695-A11714, A11801-A11850, A11889-A11890.

On March 2, 2005, the Court reaffirmed its order granting summary judgment and dismissed all Plaintiffs' cases by order dated March 10, 2005. A11050, as well as denying all motions to remand. A11043. Plaintiffs filed a timely appeal on April 1, 2005.

V. SUMMARY OF ARGUMENT

The "causal" requirements of 28 USC § 1442(a)(1) have not be met for these private manufacturers of Agent Orange, because the Government did not direct the conduct which is the subject of this action. The Government did not control the design and manufacture of Defendants' herbicides, and did not require or even specify dioxin to be in the products it received. The Defendants completely controlled the manufacturing process and chose not to adopt a state of the art process

which would have eliminated detectable dioxin in their product. The court below should have applied the rule that all doubts are to be resolved in favor of remand and remanded this case just as it did the case of *Ryan v. Dow Chemical*. Instead, the lower court expands the reach of §1442(a)(1) jurisdiction, permitting removal of virtually every case invoking the government contractor defense and intruding on the function of state courts. In doing so, the lower court rewrites Federal Officer Removal, disrupts the balance between federal and state courts and contradicts a host of cases requiring direct and detailed control as a predicate for removal.

Furthermore, the court below was mistaken when it considered the “government contractor defense” to be a qualified defense which would support removal pursuant to 28 USC §1442(a)(1) given that the statute was enacted to support Federal immunity defenses. Nor should corporations be considered persons for purposes of 28 USC §1442(a)(1) Federal Officer Removal jurisdiction.

Unlike Plaintiffs before, Plaintiffs herein present affidavits from experts on each of the principal factual points raised regarding both Federal Officer Removal and the government contractor defense. These experts include Ralph Nash, the preeminent authority on U.S. government procurement, Dr. Harry Ensley, a professor of chemistry and one of the few experts on the manufacture of 2,4,5-T and its contaminant dioxin, and Dr. Janet Weiss, a multi-board certified expert in

occupational health and medical toxicology who is also an expert in industry awareness of product dangers. The Court allowed the affidavits of each of these experts into evidence, and their opinions stand unchallenged by any contrary expert opinion testimony. Professor Nash concludes that the “reasonably precise” specification prong of *Boyle v. United Technologies Corp.*, 487 US 500 (1988) was not met nor were the contractors operating under government compulsion so as to qualify for Federal Officer Removal. Dr. Ensley opines that the chemical formulations in the contracts were generic and not “reasonably precise” and that if the defendants had used state of the art manufacturing techniques they would have produced their products without detectable amounts of dioxin. Finally, Dr. Weiss testifies that the manufacturers of the herbicides knew more about the toxicity of their products than did the government, which is quite typical of product manufacturers during that era.

Finally, there has been substantial discovery regarding the knowledge of the defendants regarding their 2,4,5-T process and dioxin since the close of the MDL. In not permitting the Plaintiffs to have any new discovery other than six depositions from the *United States v. Vertac* litigation, the court below abused its discretion. The discovery should be granted and Defendants’ summary judgment should be reversed.

VI. ARGUMENT

A. The District Court Erred in Applying an Expansive View of the Federal Officer Removal Statute

1. Standard of Review

This Court reviews *de novo* a district court's denial of a motion to remand a removed action. *Broder v. Cablevision Systems Corp.*, 418 F.3d 187, 193-94 (2d Cir. 2005). Any doubts should be resolved in favor of remand. *Lupo v. Human Affairs International, Inc.*, 28 F.3d 269, 274 (2d Cir. 1994).

B. U.S. Supreme Court Jurisprudence Interpreting 28 U.S.C. § 1442(a)(1) Does Not Allow The Court Below to Jettison Its Decision in *Ryan* And Completely Recast The Federal Officer Removal Statute

The Appellees claim federal jurisdiction under the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1), arguing that they acted under the compulsion of the federal government. The Federal Officer Removal statute permits federal officers and persons acting under them to remove to federal court civil and criminal actions brought against them in a state court for their official acts. *Mesa v. California*, 489 U.S. 121 (1989) In the present case, the district court determined that the Appellees, private government contractors, were persons within the meaning of §1442, that they were acting under color of federal office and that they asserted a colorable federal law defense -- the government contractor defense. In doing so, the district court applied

a more expansive interpretation of § 1442 than U.S. Supreme Court jurisprudence or this Circuit allows while explicitly reversing all of its own prior legal and factual finding on the very same issues. See *Ryan, supra* , and compare with *Isaacson v. Dow Chemical Co.*, 304 F.Supp. 2d 442 (2004). Section 1442 states:

“(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

“(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity 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 revenue.”

28 U.S.C. § 1442(a)(1). To qualify for removal under §1442(a)(1):

“[A]n officer...must both raise a colorable federal defense, *see Mesa v. California*, 489 U.S. 121, 139, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989), and establish that the suit is ‘for a[n] act under color of office,’ 28 U.S.C. § 1442(a)(3)(emphasis added). To satisfy the latter requirement, the officer must show a nexus, a ‘causal connection’ between the charged conduct and asserted official authority.”

Willingham v. Morgan, 395 U.S. 402, 409 (1969) (quoting *Maryland v. Soper*, 270 U.S. 9, 33, 46 (1926) (Emphasis added).

The causation element requires the defendant to prove that the *acts being sued upon* were undertaken by a federal officer or person acting under him, *Florida v.*

Cohen, 887 F.2d 1451, 1453-54 (11th Cir. 1989), and that those acts were under color of the relevant federal office. *Maine Ass'n of Interdependent neighborhoods v. Commissioner*, 876 F.2d 1051, 1054 (1st Cir. 1989).

The Supreme Court has considered this statute on several occasions but always in the context of a federal employee or agency. In a detailed analysis of the history of §1442(a) and its various incarnations in *Willingham*, 395 U.S. at 405-06, the Court found that the central purpose of federal officer removal has remained the same from its 1815 inception to its final manifestation in the judicial code of 1948 – to protect the supremacy of the federal government when federal officers are subjected to state prosecution for acts taken in their official capacity:

“The purpose of all these enactments...is not hard to discern. As [the Supreme Court] said ... in *Tennessee v. Davis*, 100 U.S. 257, 263 (1880), the Federal Government ““can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, -- if their protection must be left to the action of the State court, -- the operations of the general government may at any time be arrested at the will of one of its members.””

Willingham, 395 U.S. at 406. Thus, in *Willingham*, the Supreme Court held that federal prison officials who were sued for alleged mistreatment of a prisoner were entitled to §1442(a)(1)removal, because, as federal officials, they had a colorable

claim to a defense of official immunity for their actions.

In *Mesa, supra*, two California mail carriers were charged in state court with crimes related to the operation of their mail trucks. The defendants removed the case to federal court, contending that “the full protection of federal officers from interference by hostile state courts cannot be achieved if the averment of a federal defense must be a predicate to removal.” *Mesa*, 489 U.S. at 137. The *Mesa* Court rejected the mail carriers’ argument, holding that the trigger for removal under §1442(a)(1) is not simply a defendant’s status as a federal officer. The federal official must show both a “causal connection between what the officer has done under asserted official authority and the state prosecution,” and must premise removal “on the existence of a federal defense.” *Mesa*, 489 U.S. at 132 (*quoting Maryland*, 270 U.S. at 33).

In *Int’l Primate Prot. League v. Adm’rs of Tulane Ed. Fund*, 500 U.S. 72 (1991) the Court held that federal “agencies” could not remove state-based claims pursuant to §1442(a)(1). A federal agency, the Court reasoned, was neither an “officer of the United States” nor a “person acting under him.” *Id.* at 82-84.

In the Supreme Court’s most recent §1442(a)(1) decision, *Jefferson County v. Acker*, 527 U.S. 423 (1999), the “persons” seeking removal were once again federal employees. In fact, they were United States District Court Judges. The judges argued

that they were not subject to a county occupation tax, because it violated the intergovernmental tax immunity doctrine. *Id.* at 431. The Court allowed removal because the immunity defense claimed was colorable.

Decisions by this Circuit have consistently followed the Supreme Court’s jurisprudence regarding § 1442(a)(1), maintaining that in all removal areas, including motions pursuant to Federal Officer Removal, federal courts are courts of limited jurisdiction. *See Barbara v. New York Stock Exchange*, 99 F.3d 49 (2d Cir. 1996) (holding that the New York Stock Exchange was not a “person acting under” an officer of the SEC in suit by former floor clerk against the Exchange for wrongfully barring plaintiff from the Exchange floor and causing him to lose employment opportunities); *Mizuna, Ltd. v. Crossland Fed. Sav. Bank*, 90 F.3d 650 (2d Cir. 1996) (holding that removal jurisdiction was not well founded on § 1442(a)(1)—because no officer of the United States was named in suit against bank for which the FDIC was appointed Conservator); *Mignogna v. Sair Aviation, Inc.*, 937 F.2d 37 (2d Cir. 1991) (holding that a Nonappropriated Fund Instrumentality of the federal government, as an impersonal entity, was not an “officer” of the United States.)

In denying remand in the present case, the district court ignored the Supreme Court, ignored the decisions of this Circuit, and completely reversed in all respects its own prior *Ryan* opinion. In *Ryan*, this same court remanded an identical Agent

Orange suit on the same record (albeit by civilians who the court below never considered to be parties to its 1984 settlement), holding that these same Defendants were not “persons acting under” federal officers within the scope §1442(a)(1). The court viewed the denial of removal jurisdiction as an appropriate balance of the federalism principles which limit federal jurisdiction. *Ryan*, 781 F.Supp. at 942-43. However, in *Isaacson* the court did an about-face, stating: “Congress has decided that federal officers, and indeed, the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of §1442(a)(1).” *Isaacson*, 304 F.Supp.2d at 451. The MDL court’s sudden about-face on cases of military officers which the MDL court thought it had settled flaunts the U.S. Supreme Court’s statement in *Mesa*, 489 at 137: “We have ... not found the need to adopt a theory of “protective jurisdiction” to support Art. III “arising under” jurisdiction ... and we do not see any need for doing so here.”

Further, it is impossible to reconcile this view in *Isaacson* with what the same District Court said in *Ryan*. There the court held that removal pursuant to §1442(a)(1) requires more than “the mere assertion of a nebulous federal procurement interest,” otherwise, “any state suit against a manufacturer whose product has at one time been diverted and adapted for military use...would potentially be subject to removal, seriously undercutting the power of the state courts to hear and decide basic

tort law.” *Id.* at 951. It is this view that has been continuously supported¹ by holdings that government contractors and other private corporations could not remove state-based claims under §1442(a)(1). *See Williams v. General Electric Company*, 418 F. Supp. 610 (M.D. Pa. 2005); *Green v. A.W. Chesterton Co.*, 366 F.Supp.2d 149 (D. Maine 2005); *Snowdon v. A.W. Chesterton Company*, 366 F.Supp.2d 157 (D. Me. 2005); *Jamison v. Purdue Pharma Co.*, 251 F.Supp.2d 1315, 1325 (S.D. Miss. 2003);

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One commentator has stated:

“The *Ryan* opinion reflects the superior approach to removal by federal government contractors as it limits the class of defendants who may remove to those contractors who clearly implicate the federal government’s interest in preventing state court interference with enforcement of federal law. The history of 28 U.S.C. §1442(a)(1) indicates that the statute does not exist to protect any and all interests of the federal government. Rather, it exists to shield the federal government from state court interference with federal law enforcement. Such an interest is implicated when a government contractor is sued for producing a product or committing an action under the explicit direction of the government. The removed suit must, therefore, be precipitated by an action which was itself taken under the direction of the federal government. This concern with protecting the proper federal government interest is reflected in the strict ‘acting under’ requirement of *Ryan*.”

Comment, “The Boyle Festers: How Lax Causal Nexus Requirement on the ‘Federal Contractor Defense’ are Leading to a Disruption of Comity under the Federal Officer Removal Statute, 28 U.S.C. §1442(a)(1),” 46 *Emory L.J.* 1629, 1651 (1997) (hereinafter “The Boyle Festers”).

Tremblay v. Philip Morris, Inc., 231 F.Supp. 2d 411 (D.N.H. 2002); *Freiberg v. Swinerton Prop. Servs. Inc.*, 245 F.Supp. 2d 1144 (D.Col. 2002); *Pinney v. Nokia*, 216 F.Supp. 2d 474 (D. Md. 2002); *Russell v. Baxter Healthcare Corp.*, 2002 U.S. Dist. LEXIS 8733 (E.D. La. 2002); *Haller v. Kaiser Found. Health Plan of the Northwest*, 184 F.Supp. 2d 1040 (D. Or. 2001) *Mouton v. Flexitallic, Inc.*, 1999 U.S. Dist. LEXIS 5632 (E.D. La. 1999) *Arness v. Boeing North American, Inc.*, 997 F.Supp. 1268 (C.D. Cal. 1998); *Brown & Williamson Tobacco Corp. v. Wigand*, 913 F. Supp. 530 (W.D.Ken. 1996); *Good v. Armstrong Industries, Inc.*, 914 F.Supp. 1125 (E.D. Pa. 1996); *Anderson v. Avondale Indus.*, 1994 U.S. Dist. LEXIS 17598 (E.D.La. 1994); *Guillory v. Ree's Contract Serv., Inc.*, 872 F. Supp. 344 (S, D. Miss. 1994); *Viala v. Owens-Corning Fiberglas Corp.*, 1994 U.S. Dist. LEXIS 4824 (N.D. Cal. 1994); *Cabalic v. Owens-Corning Fiberglas Corp.*, 1994 U.S. Dist. LEXIS 14380 (N.D. Cal. 1994); *Bahrs v. Hughes Aircraft Company*, 795 F.Supp. 965 (D. Ariz. 1992).

Nevertheless, in another reversal of its prior ruling, the court below held that “[f]ailure to apply the federal officer removal statute would allow into the back door of state litigation what the government contractor defense barred at the front door.” *Isaacson*, 304 F.Supp.2d at 451. According to the court, “[I]f cases such as those in this present wave of Agent Orange claims were scattered throughout state courts,

manufacturers would have to seriously consider whether they would serve as procurement agents to the federal government.” *Id.* The court has observed that the “vagaries and hazards” of state tort law would provide a significant deterrent to necessary military procurement. *Id.* Finally, the court reasoned that “[b]ecause the government contractor cases are freighted with factual findings, *Boyle* ... may be readily circumvented by state courts unsympathetic to the defendants.” *Id.*

In *Ryan* under the same factual scenario, the court did not voice this same distrust of state courts. Instead it held that “the hypothesis that tort liability will result in increased procurement costs, does not support the claim that a state cannot fairly adjudicate cases in which that interest is at issue.” *Ryan*, 781 F.Supp. at 951. The district court then appropriately recognized that government contractor issues are not so complex that they would be beyond the ken of state courts: “The military contractor defense raises straightforward common law tort issues that the state courts are as adept at handling as the federal judiciary.” *Ryan*, 781 F.Supp. at 951.

C. The Appellees Are Not “Persons” Within the Meaning of the Federal Officer Removal Statute and Thus Cannot Rely on the Statute as a Basis for Removal

As the MDL court noted in *Ryan*, there is a split of authority with respect to whether a corporation can be a “person” acting under the direction of a federal

officer. *Ryan*, 781 F.Supp. at 946. Although the *Ryan* and *Isaacson* courts included corporations within the meaning of the term, the rationale of courts that have restricted the meaning of “person” to natural person is more persuasive and consistent with Congressional intent. *See Krangel v. Crown*, 791 F.Supp. 1436 (S.D. Ca. 1992). Moreover, none of the Supreme Court decisions reviewed have dealt with private companies, which by their very nature are further attenuated from the ambit and purpose of the statute, even if held to be “federal officers.”

D. The Appellees Have Failed to Allege a Colorable Defense Sufficient to Trigger the Application of § 1442(a)(1)

Appellees must also allege a colorable federal defense sufficient to trigger the application of § 1442(a)(1). *Mesa*, 489 U.S. at 129. Although Defendants rely upon the government contractor defense to satisfy that requirement, that defense is not the type of federal interest or immunity that supports removal under § 1442(a)(1).

In *Ryan*, the court below explained that “[t]here is considerable question as to whether the military contractor defense amounts to a defense of official immunity, or even to a defense at all.” *Id.* at 944. Indeed, upon analyzing *Boyle*, the *Ryan* court found it significant that the Supreme Court refused to characterize its military contractor preemption analysis as extending official immunity to government contractors. *Ryan*, 781 F.Supp. at 944, citing *Boyle*, 108 S.Ct. at 2514 n.1. *Ryan*

recognized that the *Boyle* Court “took pains not to disagree with the dissent’s claim that official immunity has never been understood to extend to contractors acting independently of any congressional enactment.” *Id.*, citing *Boyle*, 108 S.Ct. at 2524 (Brennan, J., dissenting). Moreover, as the *Boyle* dissent recognized and *Ryan* observed, “a grant of immunity to Government contractors could not advance ‘the fearless, vigorous, and effective administration of policies of government’ nearly as much as does ... immunity for Government employees.” *Id.*, quoting *Boyle*, 108 S.Ct. at 2524 (Brennan, J., dissenting).

In addition to the preemption analysis of *Boyle*, *Ryan* also noted that when the defendants previously attempted to remove on the basis of federal question jurisdiction, the defendants themselves cast the military contractor defense as a liability standard rather than a defense. *Id.* at 944-45. Given the *Boyle* analysis and the Defendants’ prior position on the government contractor liability standard, *Ryan* concluded that the military contractor defense did not support removal under §1442(a)(1) but merely established a federal common law standard of care that must be met to avoid liability. *Id.*

In *Isaacson*, the same court, faced with the same question, on the same disputed factual record, determined that the military contractor “defense” was without question sufficient to support removal under §1442(a)(1). *Isaacson*, at 448-49. The

court gave short shrift to its own decision, holding it was “no longer persuasive.” *Isaacson*, 304 F.Supp. 2d at 445.

In making this leap, the MDL court relied on a series of cases which inappropriately focused only upon whether it was at all likely or plausible that the defendants could establish the elements of the government contractor defense. *See Winters*, 149 F.3d at 400-01; *Miller v. Dow Chemical Co.*, 275 F.3d at 417-18; *Guillory*, *supra.* at 346; *Crocker v. Borden, Inc.*, 852 F. Supp. 1322, 1326-1327 (E.D. La. 1994); *Akin v. Big Three Indus.*, 851 F.Supp.819, 823 (E.D. Tex. 1994); *Pack v. A C & S Inc.* 838 F. Supp. 1099, 1103 (D. Md. 1993); and *Fung,v. Abex Corp.* 816 F.Supp. 569, 573 (D. Cal. 1992). This is the wrong inquiry. The proper inquiry is whether the government contractor “defense” is the type of federal defense sufficient to require removal within the definition of §1442(a)(1). The cases cited by the court below never addressed the question of whether the government contractor “defense” is a “defense” or a standard of care, or whether the government contractor defense is the type of federal immunity defense that would support removal under §1442(a)(1).

The MDL court also reversed its view of *Boyle*, now stating that the U.S. Supreme Court did not limit the scope of federal law defenses in removal cases to immunities. *Isaacson*, 304 F.Supp.2d at 450. However, this reasoning is entirely at odds with §1442(a)(1) jurisprudence. The central question in the “colorable defense”

analysis in Supreme Court cases analyzing §1442(a)(1) has always been the question of official immunity. In *Willingham*, the U.S. Supreme Court recognized that Congress' enactment of §1442(a)(1) served "to provide a federal forum for cases where federal officials must raise defenses arising from their official duties ..." 395 U.S. at 405. In explaining the significance of the text's "under color of ...office" requirement contained in the federal officer removal statute, the *Willingham* Court emphasized that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court." *Id.* at 407. Moreover, in *Mesa*, the Supreme Court held that the defendants failed to establish that removal was proper, in part because the *Mesa* defendants "could not present an official immunity defense to the state criminal prosecutions brought against them." *Mesa*, 489 U.S. at 133. Further, in distinguishing the removability of suits against agencies from suits against federal officers, the Supreme Court explained that federal officers needed the protection of a federal forum "because of the manipulable complexities involved in determining their immunity." *Mesa*, 500 U.S. at 86. *Willingham*, *Mesa*, *International Primate* and *Jefferson County* do not suggest any intention by the Court to expand those defenses supporting removal beyond immunity defenses.

In contrast to the colorable defenses referred to in Supreme Court

jurisprudence, which consist solely of defenses that may be asserted by federal agencies and officers, such as governmental immunity, the government contractor defense can never be a colorable defense for a federal officer or agency; it can only be asserted by private, non-government entities. If the Defendants are permitted to bootstrap the government contractor defense into a colorable defense under §1442, the requirement of a federal defense becomes a nullity – all government contractors will be able to invoke §1442(a)(1) jurisdiction simply by virtue of being government contractors. Elaborating on this proposition, one commentator has written:

When Congress drafted the present Federal Officer Removal Statute, it could not have anticipated the flood of federal contractor suits that have been removed after *Boyle*. All experience with previous removals had implicated clear federal defenses, often involving the statute granting power to a certain officer to perform his duties.

...[T]he *Boyle* doctrine does not require a federal forum for adjudication as it does not present the same problems with interpretation which federal statutory defenses such as immunity pose. The "federal contractor defense" devised in *Boyle* is, in fact, unequivocal in its simplicity. It plainly bars state law liability for design defects in military equipment when the contractor manufactured equipment in conformity with reasonably precise specifications approved by the United States and the contractor warned the United States of dangers in the equipment that were known to the supplier but not to the United States. This simplicity means that *the federal contractor defense is not subject to misunderstanding by state courts inexperienced with the application of the defense. Neither is it subject to manipulation by a biased state court in the way that a more complex statutory defense such as immunity might be because it does not require a determination of the proper role of a government actor. It simply requires a determination that the*

contractor produced the product in keeping with government specification and informed the government of any dangers within the contractor's knowledge.

“The Boyle Festers, ” 46 Emory L.J. at 1653-55 (citations omitted)(emphasis added).

Indeed, state courts can, and regularly do, address the “military contractor defense” in the context of federal contractors.² See *Torrington Co. v. Stutzman*, 46 S.W.3d 829 (Tex. 2000); *Jorden v. Ensign Bickford Co.*, 20 S.W.3d 847 (Tex. App. 2000); *Arnhold v. McDonnell Douglas Corp.*, 992 S.W.2d 346 (Mo. App. 1999); *Budrow v. Ames*, 1998 Conn. Super. LEXIS 1675 (Conn. Super. Ct. 1998); *Miller v. United Technology Corp.*, 660 A.2d 810 (Conn. 1995); *Anzalone v. Westech Gear Corp.*, 661 A.2d 796 (N.J. 1995); *Attocknie v. Carpenter Mfg.*, 901 P.2d 221 (Okla. Civ. App. 1995); *Timberline Air Serv. v. Bell Helicopter-Textron*, 884 P.2d 920 (Wash. 1994); *Lohse v. Faultner*, 860 P.2d 1306 (Ariz. 1992); *Trapnell v. Sysco Food Servs.*, 850 S.W.2d 529 (Tex. App. 1992); *Jackson v. Deft, Inc.*, 23 Cal.App.3d 1305 (Cal. Ct. App. 1990); *R.B.Hazard, Inc. v. Panco*, 397 S.E.2d 866 (Va. 1990); *Dorse v. Armstrong World Industries Inc.*, 513 So.2d 1265 (Fla. 1987); *Mackey v.*

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State courts also can and often do address questions of whether a state government contractor may assert the government contractor defense under state law. See, e.g., *Cunningham v. N. Ins. Co. of N.Y.*, 2004 Conn. Super. LEXIS 2491 (Conn. Super. Ct. 2004); *Bd. of Ed., et al. v. W.R. Grace Corp., et. al.*, 258 N.J. Super. 94, 609 A.2d 92 (1992); *Estate of Lyons v. CNA Ins. Cos.*, 207 Wis. 2d 446, 558 N.W.2d 658 (1996).

Maremount Corp., 504 A.2d 908 (Pa. Super. Ct. 1986); *Pietz v. Orthopedic Equipment Co.*, 562 So. 2d 152 (Ala. 1989); *McLaughlin v. Sikorsky Aircraft*, 148 Cal.App.3d 203 (Cal. App. 1983). Therefore, there is no reason that state courts cannot address the defenses that may be raised by the manufacturing Appellees here.

Finally, the lower court also relied upon a faulty analogy to support removal, stating that, “[t]he government contractor defense is a colorable federal law defense in much the same way self-defense is a colorable state law defense to civil assault charges.” *Id.* This comparison is misplaced. A federal officer attempting to remove a civil case for assault outside of the context of his duties can no more base the removal on self-defense than the mail carriers could in *Mesa* or than a government contractor should be able to base removal upon the government contract defense. The basis for removal is immunity for actions taken in the course of performing official functions. The curious result of the trial court’s decision is that it makes it much easier for a government contractor to remove a case to federal court than for a federal officer to do so. Surely, this cannot be the law.

E. The Appellees Have Failed to Meet Their Burden of Establishing That They Were “Persons Acting Under” Federal Officers Within the Meaning of Section §1442(a)(1)

In order to assert federal officer removal, the Appellees must establish, *inter*

alia, that the suit against them is for “an act under color of office.” This element requires a causal connection between the charged conduct and asserted official authority. *Id.*

In determining whether the defendant manufacturers of Agent Orange were “acting under color of office” the *Ryan* court examined several previous cases in which private corporations and individuals had been allowed removal under §1442(a)(1). In *Ryan* at 947 the MDL court wrote:

removal by a ‘person acting under’ a federal officer must be predicated upon a showing that the acts that form the basis for the state civil or criminal suit were performed pursuant *to an officer’s direct orders or to comprehensive and detailed regulations*. ... [A] person or corporation establishing only that the relevant acts occurred under the general auspices of a federal office or officer is not entitled to section 1442(a)(1) removal. *Id.* (*emphasis added*)

Two of the cases relied upon in *Ryan* were *Bakalis v. Crossland Savings Bank*, 781 F.Supp. 140 (E.D.N.Y. 1991) and *Kaplansky v. Associated YM-YWHA’s of New York, Inc.*, No. 1989 U.S. Dist. LEXIS 3062 (E.D.N.Y. 1989), both of which found that in order for a private party to fit within the ambit of the statute, the company has to be so intimately involved with the government so as to be essentially acting as an employee of the government performing official government functions. *Bakalis*, 781 F.Supp. at 145; *Kaplansky*, 1989 U.S. Dist. LEXIS 3062 at * 2-3.

Applying *Bakalis* and *Kaplansky*, the *Ryan* court found that the manufacturers of Agent Orange had failed to establish that they were “persons acting under” federal officers within the meaning of § 1442(a)(1). Although the court found some of the defendants’ actions were under the direct and detailed control of government officers, the issue was not only whether the defendants had acted under Commerce and Defense Department officials, but “whether they are in danger of being sued in state court ‘based upon actions taken pursuant to federal direction.’” 781 F.Supp. at 950. (emphasis added).

This view is consistent with the general jurisprudence regarding §1442(a)(1). For instance, just a few weeks ago in *Williams, supra*, § 1442(a)(1) jurisdiction was denied to a contractor that provided asbestos containing turbines to the Navy. The court found that although the defendant submitted an affidavit indicating that employees had regular dealings with commissioned officers and civilian employees of the Navy with regard to the design, purchase, and use of the marine steam turbines and defendant had studied military specifications dating back to World War II regarding marine steam turbines, the affidavit did not establish that defendant was acting under the direction of a federal officer in the manufacture and supply of the products. *Id.* at 613, 616-617.

Nevertheless, in *Isaacson*, 304 F.Supp.2d at 447-50, the court below reversed

still another holding of *Ryan* without explaining why its prior decision was wrong. Instead, it chose to rely upon two 5th Circuit Agent Orange cases, *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998) and *Miller, supra*, which were decided entirely upon a factual record created by the defendants (between the two cases the same Plaintiffs' counsel submitted noting more than a single affidavit of Admiral Zumwalt, and that in only one of the two cases, See 275 F.3d 422, n. 3). As a result, these two decisions are based on facts clearly contradicted by the Appellants' evidentiary submissions. *Isaacson, supra*. (See A7011-A7184 and A7795-A7941, as well as all exhibits, depositions, and affidavits referenced therein -- none of which were put forward by counsel for *Miller* or *Winters*.)

Relying upon these two decisions while ignoring the extensive record that it had before it in *Ryan* and the case at bar, the court below reversed its own understanding of the facts and found that the Appellees established that they were "acting under color of federal office," because, "the government designed, controlled and supervised the production of Agent Orange." *Isaacson*, 304 F.Supp.2d at 449. This is in stark contrast to the following findings in *Ryan* at 950: "They are being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants."

Indeed, nothing in the *Miller* or *Winters* record informed the Fifth Circuit that the specifications for Agent Orange did not require the defendants to operate at temperatures which produced measurable levels of dioxin. In the present case, the affidavit of Harry Ensley, Ph.D., explains in detail how the “reasonably precise” specifications relied upon by the Fifth Circuit – MIL 51147 and 51148 – do not, as the Fifth Circuit was led to believe, define “*all* facets of their respective chemical’s composition.” 275 F.3d at 419. The Affidavit explains that the dioxin composition of the product is not controlled by these specifications at all but rather by the amount of heat used in the production process, which was left entirely to the discretion of the Defendants. See Affidavits of Dr. Ensley at A3241-3243 and 3953-3966. Had the Fifth Circuit been provided with this information, it could never have concluded, as a matter of law, that “the alleged defect resulted not from a deviation from the required military specifications, but from defendants’ strict adherence to them.” *Id.* at 421.

1. By Definition, the Requisite Governmental Control Cannot Be Present When The Government Buys Off-The-Shelf products From Commercial Suppliers

The *Ryan* court found, “Agent Orange was a mix of pre-existing chemical formulae” and that the government had bought the chemical components as existing products, privately developed and used them in mixtures which were derived from the

defendants’, (the same Appellees in this matter), “standard recipes.” *Ryan* at 950. Thus, the *Ryan* court reasoned, “the compulsion under which the defendants operated predominantly concerned marketing rather than design and manufacture.” *Id.* Because the defendants were being sued for formulating and producing a product, “all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants,” the court held that the defendants had failed to meet the requirements of section 1442(a)(1). *Id.* The court then concluded, “[t]he government sought only to buy ready-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs’ injuries.” *Id.*

2. Defendants Were Not Compelled to Manufacture 2,4,5-T; They Freely Bid on Its Manufacture And Made a Profit

Perhaps the most telling application of *Ryan*’s “acting under color of federal office” analysis did not come in the context of §1442(a)(1) but rather in environmental contamination cases involving the *instant* Defendants Hercules and Diamond as brought by one of its successors, Maxus Energy. In these cases, Defendants sought contribution for the disposal of their Agent Orange waste within

the burden shifting parameters of the CERCLA, 42 U.S.C. § 9601 *et seq.* See *United States v. Vertac, supra.*; *Maxus Energy Corp. v. United States*, 898 F. Supp. 399 (N.D. Tex. 1995), *aff'd*, 95 F.3d 1148 (5th Cir. 1996) (regarding Diamond). Each of these cases support *Ryan*'s conclusion that the Appellees were not “acting under color of federal office” when they manufactured Agent Orange containing the hazardous contaminant, dioxin. Rather, the courts concluded that the government did not control the manufacturing of Agent Orange at the Hercules and Diamond Alkali facilities.

Removal pursuant to §1442(a)(1) requires that the Federal Government exercise such control over a “person” so as to make that person “stand in the shoes” of the federal officer. *Kaplansky, supra.* Defendants argue that this was true because the federal government “commandeered” their production. Leaving aside the fact that the relationship of each Defendant to the federal government was unique and different, the court below adopted this conclusion based entirely on facts related to one manufacturer, Diamond. *Isaacson*, 304 F. Supp. 2d at 426. By contrast, when Diamond’s successor, Maxus, argued these exact same facts as part of a CERCLA law suit, their argument regarding government control was completely rejected by both the District court and the 5th Circuit.

Maxus, tried to impose owner/arranger liability on the government in

connection with dioxin contamination at its Newark, New Jersey facility. *Maxus Energy Corp. v. United States*, 898 F. Supp. 399 (N.D. Tex. 1995), *aff'd*, 95 F.3d 1148 (5th Cir. 1996). Maxus asserted that the government's control over the Agent Orange manufacturing process was sufficient to transform the government into an operator/arranger within the meaning of CERCLA. The test for operator liability under CERCLA may be more easily met by a government contractor than a person "acting under" a federal officer pursuant to §1442(a)(1). Operator liability under §9607(a)(2) of CERCLA is imposed when: "a non-owner of the property... (1) actually *participated in the operations of the facility*; or (2) actually exercised control over, or was otherwise intimately involved in the operations of the corporation immediately responsible for the operation of the facility. *Levin Metals v. Parr-Richmond Terminal*, 781 F. Supp. 1454, 1456 (N.D. Cal. 1991)." *United States v. Vertac.*, 841 F. Supp. at 888 (emphasis added). Similarly, "arranger" liability under §9607(a)(3) exists "where the defendant retained...control of the hazardous substances throughout the production process that generated the hazardous waste." *Id.* (citing *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989)). Despite the less stringent test under CERCLA, the court flatly rejected Maxus's control argument and entered summary judgment in favor of the government:

Glossing over the fact that Diamond actively sought the government

contracts for Agent Orange, Maxus claims that the United States "effectively commandeered the Newark Plant, dictating the product to be made at the Plant, how much of that product was to be made, and to whom that product was to be sold....

Maxus has stipulated that the United States did not specify any particular production process to be used in manufacturing herbicides pursuant to the contracts. United States personnel did not hire, fire, discipline or manage any Diamond personnel working in the herbicide production process at the Newark Plant....

The Court concludes that the United States never exerted actual or substantial control over operations at the Newark Plant while Diamond was producing Agent Orange....

Diamond chose to bid for the Agent Orange government contracts, and to the extent Diamond had to change its operations to produce Agent Orange as opposed to other herbicides, those changes resulted from its own decision to seek the government's wartime business. The relationship between the United States and Diamond under the DPA is one of buyer and seller, except that the buyer has the power to require the seller to perform the contract and give it priority over other contracts. *Vertac* at 809-811. Maxus has submitted no evidence suggesting that Diamond refused to bid on any of the government contract bid solicitations or rejected any of the contracts it was awarded. To the contrary, Diamond joined forces with its fellow herbicide manufacturers in lobbying the United States to decide against producing Agent Orange in its own phenoxy herbicide facility, so that the United States would continue to rely on the manufacturers for this product.

Maxus Energy, 898 F. Supp. at 406 (emphasis added). *Maxus Energy* was affirmed without opinion by the Fifth Circuit. *Maxus Energy Corp. v. United States*, 95 F.3d 1148 (5th Cir.1996).

In *United States v. Vertac*, Hercules similarly attempted to shift liability to the federal government for environmental cleanup costs associated with dioxin

contamination at its Agent Orange manufacturing facility. Hercules asserted that the manufacturing constraints imposed under the Defense Production Act of 1950 ("DPA"), 50 U.S.C. app. §2061 *et seq.*, gave the Government substantial control over Hercules' Agent Orange manufacturing processes, transforming the Government into an "operator" or "arranger" within the meaning of "CERCLA". The Arkansas district court rejected Hercules' "attempt to inject the element of 'substantial control' into performance of contracts under the DPA," and granted the Government's motion for partial summary judgment on the issue. *United States v. Vertac*, 841 F. Supp. at 889.

As the court explained:

Furthermore, the Court cannot find under the circumstances that the degree of compulsion asserted by Hercules existed. There is no dispute that Hercules actively sought Agent Orange contracts by participating in competitive bidding and that it made a profit from each contract. There is also no dispute that Hercules sold herbicides similar to Agent Orange both prior to and after the contracts with the government. *See Ryan v. Dow Chemical*, 781 F. Supp. at 950.

Id. at 890.

In affirming the Arkansas district court, the Eight Circuit emphasized that, notwithstanding the contracting framework set out by the DPA and BDSA, Hercules could not establish the government control necessary to shift liability for the costs of environmental clean-up onto the federal government. *United States v. Vertac*

*Chemical Corp. supra.*³ If that is the case, they certainly could not be “standing in the shoes” of the Government as is required by the Federal Officer Removal Statute.

3. The Causation Requirement Cannot Be Met When Plaintiffs’ Suit Relates to Dioxin and Dioxin Is Not Specified In Any Contract

As the court observed in *Ryan* at 950, “[t]he government sought only to buy ready-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs’ injuries.” *Id.*

No other conclusion is tenable, because every contract was silent about the occurrence of dioxin in the final product.

In the cases most analogous to the instant case, courts have declined to extend §1442(a)(1) jurisdiction to government contractors where government specifications were as silent about the use of asbestos as the Agent Orange contracts were silent about dioxin. When specifications are silent, the courts have held that the government lacked the control necessary for the contractor to be “acting under” a federal officer. For instance, in both *Green, supra*, and *Snowdon, supra*, the District Court of Maine denied § 1442(a)(1) jurisdiction to the predecessor-in-interest of a

³

“Determining whether an entity has exerted...actual or substantial control requires a fact-intensive inquiry and consideration of the totality of circumstances...” *United States v. Vertac*, 46 F.3d at 808.

contractor that manufactured and supplied asbestos-containing products to the Navy. The defendant argued that the products were constructed in accordance with Navy regulations and specifications and that the construction process itself was subject to ongoing control, direction and oversight by the Navy. *Green*, 366 F.Supp.2d at 152; *Snowdon*, 366 F.Supp.2d at 160. Citing the *Ryan* rationale that “the mere provision of a dangerous product pursuant to a government order will not support removal where the claim is based on product design and manufacture,” the court concluded that the defendant failed to carry its burden under §1442(a)(1), in part because it was unclear whether the U.S. Navy specifications actually mandated asbestos or whether the defendant “chose to incorporate asbestos insulation into the ... products in order to meet a performance specification as opposed to an asbestos specification.” *Green*, 366 F.Supp.2d at 154-57; *Snowdon*, 366 F.Supp.2d at 163-65. See *Good*, *supra*. at 1130 (“Acting under the direction of the Navy...is not the same as acting under the direct and detailed control of a federal officer. Neither the notice [of removal] nor the affidavit [in support of removal] establishes that a federal officer required the use of asbestos in the design and manufacture of the turbine generators”); *Viala v. Owens-Corning Fiberglas Corp.*, 1994 U.S. Dist. LEXIS 4824 (N.D.Cal. 1994) (“[T]here is no evidence that the specifications provided by the government in any way conflicted with defendants’ state law duty to design and manufacture safe products that did not

cause asbestos-related illnesses.”) *Megill v. Worthington Pump, Inc.*, 1999 U.S. Dist. LEXIS 4433, at *12 (D. Del. 1999); *Mouton, supra.* at *18-20; *Ruffin v. Armco Steel Corp.*, 959 F.Supp. 770, 776 (S.D.Tex. 1997); *Cabalic supra* at *8-9.

The above cases confirm that when the acts made the basis of the complaint did not result from the direct and detailed supervision of a federal officer, courts should not extend §1442(a)(1) removal. Had the court below applied this standard, it should have concluded that the act complained of, the contamination of Agent Orange by dioxin, did not result from any direct order by a federal officer but was a manufacturing defect entirely within the control of the defendant.

4. The Causation Requirement Cannot Be Met when Dioxin Was Created As A Result of Manufacturing Processes which Defendants At All Times Controlled

In *Ryan*, the court below reasoned, “the compulsion under which the defendants operated predominantly concerned marketing rather than design and manufacture.” *Ryan* at 950. Because the defendants were being sued for formulating and producing a product, “all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants,” the court held that the defendants had failed to meet the requirements of section 1442(a)(1). *Ryan* at 950.

The court below could not dispute that the Defendants had complete control

over their manufacturing processes. So instead, the *Isaacson* court found that the government knowledge of dioxin, a fact clearly contradicted by the Appellants' evidence, was equivalent to government control over the production of dioxin. According to the MDL court, "[t]he government's full knowledge of the dioxin 'problem' inherent in the production of Agent Orange is evidence that the federal officials maintained control over the acts on which the litigation is based." 304 F.Supp.2d at 450.

By finding "knowledge" equivalent to "control," the court drastically expanded the scope of federal officer removal. Under this rule, virtually all asbestos cases would be removable to federal court, because, even though the government did not control the warnings provided by the asbestos companies, the government invariably knew asbestos was dangerous and that warnings were not being given. See *Grispo v. Eagle Picher Industries Inc*, 897 F 2d 626, 631 (2d Cir. 1990). The underlying legal rationale and conclusion in *Ryan* – that the "acting under" requirement of §1442(a)(1) must be interpreted narrowly to effectuate the purpose of the statute is by far the majority rule, as well as the rule that is more consistent with Supreme Court jurisprudence. The basis for this is succinctly explained by the district court in *Freiberg*,⁴ which expressly criticizes the broad application of §1442(a)(1) in *Winters*:

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Because [§1442(a)(1)] is premised on the protection of federal activity and an anachronistic mistrust of state courts' ability to protect and enforce federal interests and immunities from suit, private actors seeking to benefit from its provisions bear a special burden of establishing the official nature of their activities....

I find Winters poorly reasoned and unpersuasive..., premised, as it is, on an expansive reading of the Supreme Court's opinion in *Willingham v. Morgan* 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed.2d. 396 (1969)..., a prisoner civil rights action in which two inmates brought suit against the prison warden and chief medical officer in state court for actions taken in the course of their official duties....

Given the purpose of §1442 and its basis in a mistrust of states and state courts to protect federal interests, *I agree it should be read expansively only when the immunity of individual federal officials, and not government contractors, is at issue.*

Freiberg, 245 F.Supp.2d at 1150, 1152, n. 6 (citations omitted) (emphasis added); *see also New Jersey Department of Environmental Protection v. Exxon Mobil Corp.*, 381 F. Supp. 2d 398 (D.N.J. 2005) (citing *Freiberg* with approval); *Williams, supra.* (same).

F. Plaintiffs Have Presented Expert Testimony Which Demonstrates That this Case Should Be Remanded And, If Not, That There Are Clear Questions of Fact Which Do Not Permit the Granting of Summary Judgment Pursuant to the

In *Freiberg*, the defendant contractors included asbestos-containing components in the construction of the Rocky Flats nuclear weapons facility in Colorado. The plaintiffs filed state court tort actions, alleging that they contracted asbestosis as a result of the defendants' negligent conduct. Asserting §1442(a)(1) jurisdiction, the defendants removed the action. In granting the plaintiffs' motion to remand, the district court emphasized the lack of a nexus between government oversight and the defendants' decision to use asbestos in the construction of the facility. *Freiberg*, 245 F. Supp. 2d at 1155-56.

Government Contractor Defense

Ralph C. Nash, Jr. is Professor Emeritus of Law of The George Washington University. Professor Nash is the leading authority in the United States on government procurement law. He initially learned about Government procurement as a contract negotiator with the Department of the Navy from 1953 to 1959. In 1960 he founded the Government Contracts Program at George Washington University's Law School. He is the coauthor of a casebook, *Federal Procurement Law* (3d ed.) with John Cibinic, Jr., and author of a text, *Government Contract Changes* (2d ed. 1989, 1993 supp.). He and Professor Cibinic have also coauthored five textbooks: *Formation of Government Contracts* (3d ed. 1998), *Administration of Government Contracts* (3d ed. 1995), *Cost Reimbursement Contracting* (2d ed. 1993), *Government Contract Claims* (1981) and *Competitive Negotiation: The Source Selection Process* (2d ed. 1999). He is coauthor with Leonard Rawicz of the textbook, *Patents and Technical Data* (1983), and the three volume compendium, *Intellectual Property in Government Contracts* (5th ed. 2001), coauthor with seven other authors of the textbook, *Construction Contracting* (1991), and coauthor with Steven L. Schooner of *The Government Contracts Reference Book* (2d ed. 1998). Since 1987 he has been coauthor of a monthly analytical report on government contract issues, *The Nash & Cibinic Report*.

Professor Nash prepared two Affidavits on behalf of Plaintiffs. See A6989-A7000; A10347-10355 In these Affidavits he gives the opinion that the manufacturers cannot say that they were compelled to produce “Agent Orange” such that they would stand in the shoes of Federal Officers for the purpose of Federal Officer Removal: 1) the DO rating “does not indicate that the companies were required to enter into these contracts and the statements ... that these companies were “compelled” to produce Agent Orange” ... [is] “incorrect.” Nash at A6992 (emphasis in original). Furthermore, the specifications were not “reasonably precise” for purposes of the government contractor defense, as they only “describe the physical characteristics of the material to be delivered to the Government without, in any way, describing how it was to be manufactured. (Neither do these specifications contain any limitation on the amount of dioxin that could be contained in the product, other than a general limitation on impurities.)” They therefore are only concerned with performance specifications rather than controlling the design. Nash Affidavit at A6995.

Dr. Harry Ensley is the co-author of “Dioxins. Vol III. Assessment of Dioxin-Forming Chemical Processes,” F.E. Dryden, H.E. Ensley, R.J. Rossi and E. Jasper , EPA Report EPA-600/2-80-158: Order No. PB80-220098 (1980). Gov. Rep. Announce. Index 1980, 80(24), 5050, and was responsible for writing the chapter

regarding how dioxins are produced as part of the 2,4,5-T manufacturing process. Dr. Ensley filed two affidavits, A3241-A3243 and A3953-3966, and in these he explains how the manufacturing processes work, as well as the breaches of the standard of care in manufacturing on the part of the defendants. It was these breaches, according to Dr. Ensley, which resulted in high dioxin contamination of their products. He testifies that “as the reaction temperature is increased, the reaction producing dioxin proceeds markedly faster. Therefore, the higher the temperature of the reaction, the greater the amount of dioxin that the process will form.” A3954. As such, the available state of the art during the 1950's and 1960's was to set a reaction between 150 and 155 degrees centigrade in order for no detectable level of dioxin to be in the product. However, Dr. Ensley concludes, using higher temperatures, as the defendants did, was a violation of the standard of care for these manufacturers. *Id.* at A3955. Furthermore, Dr. Ensley testifies that the specifications were broad general chemical specifications without any degree of precision, and, in any case, they neither specified nor required dioxin at all. A3953-3966.

Janet Weiss, M.D. has board certifications in occupational medicine and medical toxicology. She is also an expert on chemicals in the workplace. After reviewing all the documents that Defendants submitted for purposes of summary judgment, as well as the Plaintiffs' submissions, she was able to evaluate and make

conclusions regarding the relative knowledge of the defendants and the government with respect to the dioxin contaminant. As such, she states to a reasonable degree of medical and scientific certainty:

that the United States government generally, and specifically those involved in procuring 2,4,5-T in the form of various “Agents” from the manufacturers, did not know as much about the dangers in the use of 2,4,5-T ... as did the manufacturing Defendants. ...

By contrast, the United States was led to believe that the 2,4,5-T being purchased by the government had caused no health problems to workers, nor could it cause health problems to anyone:

As was true with most chemicals during this time, the Government had to rely on the manufacturers for full and complete disclosure regarding information as to all of the dangers posed by the manufacturers’ 2,4,5-T and its dioxin contaminant. Yet, the documentary evidence demonstrates that full disclosure was not forthcoming. In fact, there is documentary evidence which demonstrates that the companies sought to withhold certain key health and toxicity information from the public. .. Additionally, one of the key necessary aspects of the sale of any chemical product, product stewardship, is that the seller must do everything possible to minimize the potential danger of the product to any consumers of the product. In this case, the companies were each aware that the dangerous nature of their 2,4,5-T product was increased as the product was made at higher temperatures, because 2,3,7,8-TCDD was produced in increasing amounts as the temperature rose. In fact, there is clear evidence that the Dow Chemical Company and Diamond Alkali were made aware of this fact in the late 1950's and that all of the other manufacturers were subsequently made aware of the relationship of temperature to their 2,4,5-T products’ overall toxicity. Nevertheless, in the information I have reviewed I have not seen any documents demonstrating that the government was informed by the manufacturers

of the potential increased toxicity of the products they were making due to the fact that they were choosing to use higher temperatures in their reaction process. Nor have I seen documentation demonstrating that the Defendants even revealed the temperature at which they were conducting their reactions to make 2,4,5-T to the government. Because Defendants were aware of the temperatures Boehringer used to increase product safety, it was incumbent upon them to inform the government that they were using significantly higher and more dangerous temperatures to manufacture [sic] their 2,4,5-T product. Because the risk of adverse outcomes increases with the potential for exposure, this increased production of 2,3,7,8-TCDD should have been information that the companies provided to the government to enable it to make a fully informed decision about the use of the product. Certainly, this was information over which the manufacturers had superior knowledge.

Dr. Weiss continues:

18. In conclusion, from my review of the records, it is my opinion that the totality of the information known to the Defense Department and other agencies involved in the evaluation of 2,4,5-T for use in Viet Nam, including those involved in the purchase of 2,4,5-T from the manufacturers, was insufficient for these government agencies to fully appreciate the adverse toxicological potential of Defendants' 2,4,5-T as manufactured and sold during the period of time that it was purchased from the Defendants. The sparse nature of the government's information led to the belief that the purchased 2,4,5-T at worst could and had caused no more than minor skin irritations, and that even this was extraordinarily unlikely in any exposed population. Overall the information was that the material had minimal toxicity, even being compared to aspirin. This view markedly contrasted with the vast internal information available to those who knew the product most intimately, the manufacturers, who were able to and did conduct surveillance on their own worker populations, generally concluding that the chloracnegenic contaminant of 2,4,5-T (2,3,7,8-TCDD) caused systemic illnesses, including liver disorders and possibly cancer, which were long term and potentially life threatening.

19. As a result of all of the above, it is my opinion to a reasonable degree of scientific and medical certainty, that the government did not have equivalent knowledge, and clearly had less knowledge, when compared to the manufacturers regarding the dangers posed by the 2,4,5-T product being purchased by the government and particularly its contaminant 2,3,7,8-TCDD (“dioxin”).

Weiss Affidavit, A3972-3976.

G. The Trial Court Abused its Discretion in Denying Plaintiffs’ Discovery

Over the past twenty years, Defendants have each been engaged in a variety of other lawsuits where documents, affidavits, depositions, and trial testimony regarding subjects pertinent to this litigation were produced. In these cases, defendants have been sued by end-users of their herbicide products, by citizens exposed to industrial contamination emanating from their herbicide production facilities, and by their own workers. Much of this voluminous discovery would be particularly germane to the matters at issue here, as one of the primary issues in every one of these cases was the Defendants’ knowledge of adverse health effects caused by their herbicides and particularly by the dioxin contaminant. Moreover, it is clear that many of these actions have engaged in far more in-depth discovery against these defendants than that which occurred in MDL 381. In MDL 381, by far the vast majority of the discovery was taken against the government, primarily by the defendants. Thus, there

is little question that this discovery would directly assist Plaintiffs at least in responding to the third prong of *Boyle* relating to the knowledge of each defendant regarding the adverse health effects caused by the dioxin contamination of Defendants' products..

For instance, Dow has been sued on numerous occasions by individuals who were either domestic herbicide sprayers or who had been exposed to domestic herbicide spraying. All of these cases would necessarily have involved Dow's knowledge of the health effects caused by these chemicals. As to published decisions alone, Dow has been involved in at minimum the following cases since the completion of "Agent Orange MDL" discovery: *DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677 (R.I. 1999); *Arkansas ex rel. Bryant v. Dow Chem. Co.*, 981 F. Supp.1170 (E.D.Ark. 1997); *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 875 P.2d 1213 (Wash. 1994); *Peteet v. Dow Chemical Co.*, 868 F.2d 1428 (5th Cir. 1989); and *Keister v. Dow Chem. Co.*, 723 F. Supp. 117 (E.D. Ark. 1989). Dow also was engaged extensively, including submitting numerous affidavits and witness testimony, in the EPA registration hearings for 2,4,5-T, which began in 1979 and which resulted in all 2,4,5-T products being removed from the market.

Monsanto has also been involved in a large number of cases, including

MacDonald v. Monsanto, Co., 27 F.3d 1021 (5th Cir. 1994) and *Peterson v. Monsanto Co.*, 157 Ill.App.3d 508, 510 N.E.2d 458 (Ill.App. 1987). Indeed, in *Adkins vs. Monsanto*, there were 400 boxes of material produced by Monsanto alone. See Affidavit of Monsanto attorney Michael Newport, attached as A6977-6978, with the vast majority of these being subject to a protective order . “Protective Order” in *Adkins v. Monsanto Company*, attached as A6979-A6985. Furthermore, in the case of *Kemner v. Monsanto*, which was the longest running civil trial in American history, there were approximately 100,000 pages of trial transcript, testimony from 182 witnesses, and 190 file boxes of documents produced. See Affidavit of Monsanto Attorney Kenneth R. Heineman, attached as A6986-6988.

Similarly, Diamond Shamrock has at minimum been involved in the case entitled, *Ironbound Health Rights Advisory Comm. v. Diamond Shamrock Chem. Co.*, 216 N.J.Super. 166, 523 A.2d 250 (N.J.Super. Ct. 1987).

In addition to the case of *United States v. Vertac, supra*, Hercules has been involved in at least the following cases: *O'Dell v. Hercules*, 904 F.2d 1194 (8th Cir. 1990); and *Arkansas Peace Center v. Arkansas Department of Pollution Control and Ecology*, 999 F.2d 1212 (8th Cir. 1993).

Beyond this, numerous production line workers and exposed community

residents surrounding the Defendants' manufacturing facilities have brought suit against each of the Defendants. In addition, NIOSH has conducted a complete analysis of the health of the workers at each of the Defendants' 2,4,5-T manufacturing sites for which Defendants have had to provide thorough information regarding manufacturing processes and product contamination with dioxin. *See, e.g.,* Fingerhut, *et al.*, “Cancer Mortality in Workers Exposed to 2,3,7,8 Tetrachlorodibenzo-p-dioxin,” *The New England Journal of Medicine*, (Jan. 24, 1991), attached as A7734-7739. Yet, again, Defendants have refused to produce any of this clearly discoverable material.

Summary judgment should only be granted if "after discovery, the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof." *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 303-04 (2d Cir. 2003) The nonmoving party must have had the opportunity to discover information that is essential to his opposition to the motion for summary judgment. Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery. *Hellstrom v. U.S. Dept. of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000).

In this case, the court did not allow the Plaintiffs a single page of discovery

beyond what was already accumulated more than twenty years ago from any defendant other than Hercules, and the court artificially limited that discovery to a maximum of six depositions. The court limited the Plaintiffs to a litigation archive over twenty years old, without the benefit of any information which has been elicited since. The court froze the Plaintiffs in time, even though they submitted an affidavit under Fed.R.Civ.P. 56(f) which identified multiple lawsuits involving the same defendants which concerned their knowledge of the dangers of dioxin and control over their production processes. See “Affidavit of Gerson H. Smoger Regarding Further Discovery to Reply to Defendants’ Motion for Summary Judgment,” dated February 6, 2004. A11193-A11198.

The court’s summary dismissal of the claims of these Viet Nam veterans, without even allowing a stitch of discovery from the defendants, cannot be sustained.

Miller, supra.

IX. CONCLUSION

Plaintiffs' motion for remand should be granted and Plaintiffs' action should be transferred back to state court in New Jersey. As it is a predicate jurisdictional motion, Plaintiffs request that if it is not granted, then the court's ruling on summary judgment be reversed on the basis that Defendants have not met the requirements for summary judgment pursuant to the government contractor defense and/or that Plaintiffs have not been permitted to conduct the discovery they need, as the court has abused its discretion in denying non-MDL discovery to Plaintiffs.

Respectfully Submitted,

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VIII. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 13,185 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Wordperfect in 14-point Times New Roman.

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CERTIFICATIONS PURSUANT TO LOCAL RULE 32(a)(1)

I, Stephen Peabody, hereby certify that: a converted PDF version of the foregoing brief was created and compared to the paper original and found to be a true and complete copy thereof. Said PDF version of the foregoing brief was also scanned for viruses using Symantec AntiVirus Full Version 10.0.0.359. No viruses were detected. Said PDF version was also submitted to the Court and opposing counsel via e-mail attachment.

Stephen Peabody