

# 05-1820-cv

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT



In Re:  
“Agent Orange”  
Products Liability Litigation

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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.*

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

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## REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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## I. INTRODUCTION<sup>1</sup>

Defendants-Appellees (hereinafter also referred to as “Manufacturers”) carefully avoid confronting the central purpose of the Federal Officer removal statute in their brief: to prevent state courts from asserting sovereignty over federal officers performing their duties. During the course of its almost two hundred year existence, no Congress ever indicated that the Federal Officer Removal statute, as enacted, amended, or re-enacted, was intended to deprive state courts over jurisdiction of product liability claims between third parties. Manufacturers’ expansive reading of §1442(a (1) divorces the statute from its core purpose, but even with an expansive reading Manufacturers do not and cannot

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<sup>1</sup> In Plaintiffs’ original brief, they set forth why this action should be remanded, as well as why summary judgment should be reversed. Appellees responded only to the issue of remand in their reply. Given that there has never been a court order to allow such briefing and Appellees have cited no authority allowing them to create their own rules, the Isaacsons contend that Appellees have waived any reply in support of their summary judgment. Indeed, to the extent Appellees’ unique approach to responsive briefing is permitted to apply to Isaacson, Isaacson adopts the responses made by all other veterans to Appellees’ so-called Stephenson “GCD brief.” Secondly, in their removal brief, Appellees have incorporated their statement of facts in their “GCD Brief.” RIR4. Plaintiffs adopt the factual statements made in the opening briefs of the Anderson, Bauer, and Stephenson plaintiffs, as well as those made in any of their reply briefs. For convenience, the briefing in this action will be abbreviated as follows (with each abbreviation followed immediately by the cited page): Anderson opening brief – AA; Bauer opening brief – AB; Isaacson opening brief – AI; Stephenson opening brief – AS; Appellees’ Stephenson response brief – RSGCD; Appellees’ Isaacson response brief – RIR; Public Citizen’s amicus brief – PCA; and the veterans’ amicus brief – VA.

show that they were “person[s] acting under [an] officer” when they performed the acts upon which they are being sued here. Neither can they fulfill the additional requirements which the Supreme Court articulated in *Willingham v. Morgan*, 395 U.S. 402,409 (1969), AI17: 1) they do not raise a colorable federal defense; and 2) they do not show that the Plaintiffs’ lawsuit is based on the acts they performed “under color of office.” Manufacturers fail the “causal connection” requirement, because the government never requested dioxin-contaminated products which resulted solely from Manufacturers’ proprietary production processes.

Nor do Manufacturers dispute that the applicable requirements for this court’s review are stated by *Lupo v. Human Affairs International, Inc.*, “In light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability.” 28 F.3d 269,274 (2d Cir.1994); See also *Gaus v. Miles, Inc.*, 980 F. 2d 564,566-67 (9th Cir.1992) (holding that the removal statute is strictly construed against removal). Nor do they contest the fact that motions to remand are reviewed *de novo*. RIR15.

Still, they ask this court to follow Judge Weinstein’s findings of fact in *Isaacson v. Dow Chem. Co.* 304 F. Supp. 2d 442 (E.D.N.Y.2004), which

inappropriately resolved all doubts in favor of removability and ignore his completely contrary findings of fact in *Ryan v. Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y.1992). Although Manufacturers request that Judge Weinstein's *Isaacson* findings be adopted unless clearly erroneous, RIR14-15,RIR33n.10, it is the findings in *Ryan*, AI35-36,41,44, which should be given deference. These findings should have, at minimum, been *law of the case* or collaterally estopped defendants on this issue. After all, Manufacturers themselves maintain that Judge Weinstein based his findings of fact on the same MDL record here that resulted in his prior *Ryan* findings. RIR3,4.

On this basis it is at least arguable that Judge Weinstein was bound to accept his own factual conclusions. (See *Metromedia Co. v. Fugazy*, 983 F.2d 350,366 (2d Cir.1992) (holding that bankruptcy court decision could have preclusive effect even if it could not be reviewed in the Court of Appeals); *Georgakis v. Eastern Airlines*, 512 F. Supp. 330 (E.D.N.Y.1981) (applying offensive collateral estoppel in spite of interlocutory nature of the preclusive ruling)). As Judge Friendly wrote in *Zdanok v. Glidden Company, Durkee Famous Food Division*, there are times when collateral estoppel should be applied offensively, even if the preclusive decision had not reached final judgment, because of "the relative unseemliness of a court's altering a legal ruling...and of its

applying one rule to one pair of litigants but a different one to another pair identically situated.” 327 F.2d 944, 955 (2d Cir.1964).

The unseemliness of Judge Weinstein’s repudiation of his *Ryan* factual findings is especially striking since the Isaacsons have submitted a much more robust record favoring remand than did the plaintiffs in *Ryan*. Far from being “undisputed,” RIR4, that record is now bolstered by numerous documents and deposition exhibits not previously submitted, including those from the *Maxus, infra.* and *Vertac, infra.* litigation, as well as the uncontroverted affidavits of two expert witnesses, Ralph Nash and Dr. Harry Ensley, which state that defendants were not compelled by the government to do anything that give rise to the claims in this case. At minimum, the many conflicts between Judge Weinstein’s two decisions on the same subject demonstrate why the findings in *Isaacson*, which fail to reference any briefing or evidence submitted by Plaintiffs, are “clearly erroneous”. The “clearly erroneous” test provides that “[a] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. U.S. Gypsum Co.*, 333 U.S. 364,395 (1948). Here, If anything should be affirmed, it is Judge Weinstein’s decision in *Ryan*.

## II. PAST DECISIONS ON THE REMOVAL ISSUE NEITHER PROVIDE GUIDANCE NOR WEIGH IN FAVOR OF REMOVAL HERE

Although the other court that addressed the issue, *Winters v. Diamond Shamrock*, 149 F.3d 387 (5<sup>th</sup> Cir.1998), refused to apply collateral estoppel against these defendants because of the unavailability of appellate review of *Ryan*, that court did not have the benefit of the extensive MDL 381 record available to Judge Weinstein, as it was then located at the National Archives. Its decisions were based almost entirely on careful selections from that record made by the Manufacturers AI19-20. Plaintiffs' counsel in that case submitted no documents or deposition testimony whatsoever, much less the evidence and expert affidavits that Plaintiffs have submitted here. See. e.g., A3241-43, A3953-66, A6989-7000, A10347-10352; AI32-37.

If this court seeks any guidance from cases outside the MDL, it should be from the ardently fought cases of *United States v. Vertac Chemical Corp.*, 841 F. Supp. 884 (E.D.Ark.1993), involving Defendant Hercules, and *Maxus Energy Corp. v. United States*, 898 F. Supp. (N.D.Tex.1995), *aff'd*, 95 F.3d 1148 (5<sup>th</sup> Cir.1996), involving Defendant Diamond. In these cases, unlike *Winters*, extensive deposition testimony and discovery was taken by both sides. Much of this was presented to the court below as additional evidence against both removal

and summary judgment. A7011-7184, A7795-7941. Although, the defendants argue that these CERCLA cases, RIR40-43, do not relate to the issue of whether this case is removable under 28 U.S.C. §1442(a)(1), the CERCLA test is virtually identical to the test under the removal statute. Whether the government “actually exercised control over, or was otherwise intimately involved in the operations of the corporation immediately responsible for the operation of the facility,” RIR40-41, is remarkably similar to one of §1442(a)(1)’s requirements: private corporations may remove only when the corporation is so “intimately involved with government functions as to occupy essentially the position of an employee of the government” because “government employees are the primary protected class of §1442(a)(1).” *Bakalis v. Crossland Savings Bank*, 781 F Supp 140,145 (E.D.N.Y.1991). In ruling that the government did not in any way control the manufacturing of Agent Orange at either the Hercules or Diamond facilities, AI36-41, those courts applied an analysis consistent with §1442(a)(1). Not only were Manufacturers unable to show that the government required them to use a manufacturing process that created high levels of dioxin, in the CERCLA cases summary judgment was granted against them on precisely this issue of government direction and control.

### **III. THE SUPREME COURT’S DISCUSSION REGARDING A “NARROW... INTERPRETATION” DOES NOT APPLY TO GOVERNMENT CONTRACTORS HERE**

Without expressly arguing against *Lupo*’s holding that any doubts should be resolved in favor of remand, Manufacturers indicate that remands pursuant to §1442(a)(1), deserve special treatment. They claim *Jefferson County, Alabama v. Acker*, 527 U.S. 423 (1999) and *Willingham* at 405 require that removal jurisdiction should not be viewed narrowly, applying these words to this case. RIR19-20. However, the Supreme Court only intended that a “narrow, grudging interpretation of the statute” should be avoided in construing the “colorable federal defense requirement” because "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court." *Willingham* at 407.

This is because in both *Jefferson County* and *Willingham*, removal was sought by federal officers. The Supreme Court did not suggest that a broad construction should be used to construe whether a person was a federal officer or “acting under that officer,” or that courts should err on the side of corporations in making that decision. Rather than confront this issue head on, Manufacturers subtly insert the word “defendants” in place of “judges” when quoting from *Jefferson County*, as though §1442(a)(1) makes no difference between a private

corporation and a federal judge. RIR27.

The concerns *Willingham* and *Jefferson County* have about frustrating federal officer removal by a narrow interpretation of §1442(a)(1) do not apply where, as here, the question is whether a defendant stands in the shoes of a federal officer. Indeed, when the scope of the statute has been at issue, the Supreme Court has adopted a narrowing construction. PCA7-11. As stated in *Freiberg v. Suinerton & Walberg Property Services, Inc.*, “[g]iven the purpose of §1442 and its basis in a mistrust of states and state courts to protect federal interests, [the statute] should be read expansively only when the immunity of individual federal officials, and not government contractors, is at issue.” 245 F.Supp.2d 1144, 1152n.6 (D.Col.2002).

Clearly, by giving a “broad” interpretation to the “acting under” clause in favor of removal, the court below erred. *Isaacson* at 451. AI21. It defied the principle that federal courts are courts of limited jurisdiction and that statutes affording removal are strictly construed. See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Epperson v. Northrop Grumman Systems Corp.*, 2006 WL 90070 (E.D.Va.).

As one commentator stated,

To offer a private corporation acting on its own initiative the ability to

remove a case brought against it in state court to a federal forum, simply because that corporation is being paid by the federal government to provide a product, is to infringe upon a state's sovereignty by thwarting its ability to adjudicate disputes in its own judicial system. A state has an important interest in resolving cases filed in its courts....The only interest significant enough to be protected by federal officer removal is the interest in enforcement of federal law in support of a supreme national government.

“The *Boyle* Festers: How Lax Causal Nexus Requirements and the “Federal Contractor Defense” Are Leading to a Disruption of Comity under the Federal Officer Removal Statute,” 46 *Emory L.J.*1629,1657 (1997) (Footnotes omitted)

#### **IV. IT IS QUESTIONABLE WHETHER CORPORATIONS WERE EVEN INTENDED TO BENEFIT FROM §1442(a)(1)'s REMOVAL PROVISIONS**

Furthermore, nothing suggests that §1442(a)(1) was intended to be applied to corporations at all. “The federal officer removal statute has a long history,” *Willingham v. Morgan*, 395 U.S. 402,405 (1969), going back to the War of 1812. See also Richard H. Fallon, Jr., *The Federal Courts and the Federal System* 951 (4th ed.1996). Yet, only in the late twentieth century did corporations begin to use this statute to avoid state court jurisdiction. Before that, the use of the statute had been reserved for government employees and those directly assisting them in performing a government function. *Willingham* at 405. Indeed, every case reviewed by the Supreme Court has been in the context of removal by a Federal employee.

*Krangel v. Crown*, 791 F. Supp.1436 (S.D.Cal.1992) refused to hold that a corporation was a “person” under §1442(a)(1). That court found that the purpose of §1442(a)(1) was to protect individual officers. *Id.* at 1442. Additionally, the court held that whether §1442(a)(1) applies to a particular corporation is a mixed question of law and fact. *Id.* at 1444. At most, for a corporation to be protected, it must have an exceptionally close relationship with a federal officer, such as an employer/employee relationship. *Id.* at 1443.

Despite its ever-broadening use in the past fifteen years by corporations seeking to escape state courts, the history and background of the statute show that corporations were never its intended beneficiaries. Manufacturers cite to 1 U.S.C. §1, the “Dictionary Act,” RIR26, but only to circumvent the obvious lack of congressional intent. The act only creates a presumption that a word is to be interpreted as defined in the act “unless the context” indicates otherwise. In order to evaluate a word in “context,” a court needs to consider “the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts.” *Rowland v. California Men’s Colony* , 506 U.S. 194,199 (1993). The text of §1442(a)(1) is clear that those meant to gain its protection are real, live people acting under Federal employees; going back two hundred years, the act was never designed to define corporations as “persons” within its context.

This is consistent with the holding by the Ninth Circuit in *Adams v. United States*, 420 F.3d 1049,1050,1053 (9<sup>th</sup> Cir.2005) In finding that under the FTCA “persons” do not include corporations (only “natural persons”), the court noted that the FTCA refers to “an Employee of the Government or his estate,” and corporations do not have estates:

We conclude that the word "persons" as used in this portion of the FTCA does not include corporations, notwithstanding the [\*\*2] Dictionary Act's provision that the word "person" when used in an Act of Congress includes "corporations" "unless the context indicates otherwise." 1 U.S.C. §1. Thus, we hold that a corporation may not obtain immunity through the certification process of 28 U.S.C. §2679, and we affirm the district court's order affirming the government's denial of FTCA certification to the corporate defendants.

*Id.* at 1050.

Indeed, in *Willingham* the Supreme Court said that “[o]ne of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court,” 395 US at 407, because Section (a)(1) addresses suits brought against persons in their “official or individual capacity...” A corporation does not have an official or individual capacity.

## **V. THE GOVERNMENT CONTRACTOR DEFENSE IS A FORM OF PREEMPTION AND NOT A DEFENSE UPON WHICH REMOVAL MAY BE BASED UNDER §1442(a)(1)**

Removal under §1442(a)(1) is only appropriate for the determination of the

validity of “official immunity” in federal court. *Willingham* at 407. (See *Richardson v. McKnight*, 521 U.S. 399,405-10 (1997) (privately employed prison guards of for-profit corporation running state correctional center not entitled to qualified immunity because “[h]istory does not reveal a ‘firmly rooted’ tradition of immunity” for prison guards and immunity would not serve purposes of the doctrine)). Despite Manufacturers’ desire to be miraculously “clothed in the government’s unwaived sovereign immunity” by judicial fiat, RIR50, the government contractor defense does not give contractors a statutorily prescribed official immunity from suit. The defense is unarguably a judicially created form of preemption which the Supreme Court crafted in *Boyle v. United Technologies*, 487 U.S. 500 (1987), long after §1442(a)(1) was enacted by Congress.

As a form of preemption, the government contractor defense safeguards federal interests in carrying out federal contracts. See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S.504 (1992) (reconciling, under preemption principles, various state common law damage actions with federal regulation of cigarettes). A necessary premise of the District Court’s holding, therefore, is that Congress, through §1442(a)(1), decided that state courts are not competent to hear preemption defenses: “*Boyle* ... may be readily circumvented by state courts unsympathetic to the defendants.” *Isaacson*, at 451. AI24.

The Supreme Court has squarely rejected the district court’s premise in two ways. First, “a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff’s complaint, and even if both parties concede that the federal defense is the only question truly at issue.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (emphasis added). And, second, “when a state proceeding presents a . . . preemption issue, the proper course is to seek resolution of that issue by the state court,” as state courts are “presumed competent to resolve federal issues.” *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 149-150 (1988). Congress could have created federal jurisdiction for federal defenses, but it has not done so - this court should not invent such a rule here. Indeed, when examining removals based on preemption, courts do not credit the defendants’ theory of the case; they follow the “prudent course” approach to remand to state court absent Congress’s clear intent to create removal jurisdiction. *Metropolitan Life Ins. v. Taylor*, 481 US 58,67 (1987) (Brennan concurring)<sup>2</sup> Nor is there any question that state courts

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<sup>2</sup> In *Ryan* at 944-945 the district court clearly understood this, denying that the government contractor defense is an applicable §1442(a)(1) defense, IA25-26, a fact which Manufacturers cleverly obscure in their only response to Judge Weinstein’s almost complete about face. RIR33n.10. Furthermore, the “nonsensical” “metaphysical distinction” and “irrelevant terminological hairsplitting” Manufacturers deride, RIR46n.17,50 did not initiate with Plaintiffs but Judge Weinstein in *Ryan*. *Id.*

routinely exercise their jurisdiction over the government contractor defense. AI30-31.

**VI. GOVERNMENT COMPULSION OR “DIRECTION” ALONE IS NOT A BASIS FOR REMOVAL UNDER §1442(a)(1); THE PRIVATE ACTOR MUST BE CARRYING OUT AN OFFICIAL GOVERNMENT FUNCTION OR STANDING IN THE SHOES OF A GOVERNMENT OFFICIAL**

§1442(a)(1) states that a removing defendant must be sued in “an official or individual capacity for any act under color of such office,” meaning that a defendant must have been acting in an official capacity when performing the act in question. Congress’s language thus excludes a private actor not carrying out an official governmental function or standing in the shoes of a government official. See *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561,575 (1995) (under “doctrine of noscitur a sociis,” a “word is known by the company it keeps”); *Neal v. Clark*, 95 U.S. 704, 708 (1877) (“It is a familiar rule in the interpretation of . . . statutes that a passage will be best interpreted by reference to that which precedes and follows it.”) (internal quotation marks omitted). Yet, Manufacturers request removal while neither arguing that they were carrying out an official government function nor standing in the shoes of a government official.

Manufacturers ignore the appropriate “official function” test which must be applied to private parties seeking §1442(a)(1) removal: Is the conduct of the

private party that is attempting to invoke §1442(a)(1) jurisdiction tantamount to official governmental conduct? This is a test which is not satisfied by showing that the private actor complied with a law or regulation, much less voluntarily bid on a government contract. In *Brown & Williamson Tobacco Corp. v. Wigand*, 913 F. Supp. 530, 533 (W.D.Ky.1996), for example, the court denied removal to a defendant compelled to testify pursuant to a subpoena, reasoning that he was not acting under a federal officer because he “ha[d] not been directed to perform an official function as an officer or agent of the government.” See *Kaplansky v. Associated YM-YWHA’s of Greater New York, Inc.*, 1989 WL 29938 (E.D.N.Y.1989) (parties complying with subpoena were not “acting under” federal officer because defendants were not “asked to stand in the shoes of [federal] officers or agents and perform ‘official’ functions”); *Bakalis v. Crossland Savings Bank* 781 F Supp 140,145 (E.D.N.Y.1991) (bank was not “acting under” federal officer based on federal regulation because removal is permitted only “when the corporation is intimately involved with government functions as to occupy essentially the position of an employee of the government”); *Group Health Inc. v. Blue Cross Ass’n*, 587 F. Supp. 887,890 (S.D.N.Y.1984) (private corporations to remove only when the corporation is so intimately involved with government functions as to occupy essentially the position of an employee of the government.)

In *City of Greenwood v. Peacock*, 384 U.S.8808 (1966) the Supreme Court decided whether private parties could avail themselves of the civil rights removal provision of 28 U.S.C. §1443(2), which authorizes removal for “any act under color of authority derived from any law providing for equal rights.” In resolving the question, the Court looked to a predecessor statute of §1443(2) which limited removal to “officer[s]” or “other persons.” *Id.* at 816. The Court concluded that the “other person” clause protected only “officers and agents” of the Freedmen’s Bureau charged with enforcing the Civil Rights Act of 1866. *Id.* Those agents derived their authority from the Freedmen’s Bureau legislation and were entitled to removal, if not as officers, then “based upon their enforcement activities under the Freedmen’s Bureau legislation and the Civil Rights Act.” *Id.* at 818.

Although interpreting §1443(2), the Court held that the “other person” clause of that provision tracked the “acting under” clause of a predecessor to §1442(a)(1). *Id.* at 823n.20. (“The limitation of 28 U.S.C. §1443(2) to official enforcement activity . . . draws support from analogous provisions in the removal statutes available to federal revenue officers.” *Id.* at 820n.17).

*Peacock* shows that the “acting under” clause of §1442(a)(1) should encompass only “federal officers or agents and those authorized to act with or for them in affirmatively executing [their] duties.” *Id.* at 824. The District Court’s

test, whether a private party is subject to “direct and detailed control,” *Isaacson* at 448, or Manufacturers’ even looser standard of mere “direction,” RIR16, do not follow that teaching. They confuse private parties authorized to act as a Federal officer (such as a private party imbued with authority to enforce the Civil Rights Act) with those that merely supply products to the government. (See *Kennedy v. Health Options, Inc.*, 329 F. Supp. 2d 1314,1318 (S.D. Fla.2004) (contractual relationship “does not in itself constitute the direct and detailed control that is required to assert federal jurisdiction”).

In reality, Manufacturers are artfully requesting this court to jettison the “under color of such office” requirement and merge it into the “acting under that officer” requirement. RIR27-28. They cite *Winters*, which failed to undertake any independent “acting under” analysis and decided both questions by concluding that a showing of a “casual nexus between the federal officer’s direction and the plaintiff’s claims,” RIR27, eliminated the need to undertake the “under color of office” analysis. Later, in articulating their "mere direction" argument, RIR34-35, Manufacturers once again ignore the "under that officer" requirement. Warning that unless their view is adopted removal for even government employees would be limited to "compelled" prison laborers, they miss the point. Federal employees are already "officers" of the government and for them the only question is whether

they were acting "under color of such office" when performing the specific acts sued upon. However, those who aren't "officers of the United States" must show first that they were acting as officers would have.

Manufacturers attempt to distinguish *Bakalis*, *Kaplansky*, and *Wigand* on the basis that those relationships with the government were not “close, ongoing, and coercive relationship[s].” RIR39. Again this is not the point. They were not performing any official government functions. In their quest to divert this court from the substance of these cases, Manufacturers do not dispute the substantive law they recite, such as the court’s ruling in *Bakalis, supra.* at 146 that “allowing removal in the circumstances of this case would clearly greatly expand the caseload of the federal courts and their intrusion on the prerogative of the state courts. Both are unwelcome outcomes.” *Id.* Instead, Manufacturers here would massively expand Federal jurisdiction so that it will automatically apply to all government contractors. RIR55-58 (See RIR23, arguing that if the government can make a commodity, then contractors should be immunized when they merely sell the same commodity to the government). Such a vast expansion of jurisdiction, based solely on the government contractor defense, is inconsistent with *Boyle* itself. *Boyle* at 2517 indicated that the defense only applies when the contractor cannot comply “with both its contractual obligations and the state-

prescribed duty of care.” If the Supreme Court had intended that determination to be made only by federal courts, it would have said so.

**VII. ALTHOUGH NEITHER “COMPULSION” NOR “DIRECTION” IS SUFFICIENT TO SUPPORT §1442(a)(1) REMOVAL, MANUFACTURERS WERE NEVER COMPELLED NOR DIRECTED TO ENTER INTO CONTRACTS TO PRODUCE 2,4,5-T AND, MORE IMPORTANTLY, WERE NEVER COMPELLED NOR “DIRECTED” TO PRODUCE DIOXIN**

Even if the 2,4,5-T containing Agents were produced pursuant to government regulations and later in response to a directive - no matter how comprehensive or detailed - that is not a basis for §1442(a)(1) removal.

Manufacturers must show that they were either standing in the shoes of the government or carrying out an official governmental function. They have proven neither.

Moreover, to suggest that the relationship between the government and these chemical manufacturers, who actively sought out lucrative government contracts, was coercive, RIR8-14,30,35 is an exaggeration, if not downright false.

As has been shown in the expert affidavit of Ralph Nash (responded to by Manufacturers only in the form of their own attorneys’ musings), Manufacturers were never forced to produce 2,4,5-T and their actual production of 2,4,5-T was never under the “control” of the Federal government. Nash, A6991-93. “Pursuant

to these contracts, the government neither exercised control over this manufacture nor were they given the power to exercise that control.” Nash, A10352. Because Manufacturers were in control of 2,4,5-T’s method of manufacture and dioxin was never specified as a product desired by the government, Manufacturers were free to deliver a product which was not highly contaminated with dioxin. (See Plaintiffs Stephenson’s Response Brief, Sections IV and VII.)

While artfully alleging that they were “effectively” compelled to produce various 2,4,5-T containing Agents, RSGCD11, Manufacturers do not dispute these central facts necessary to prove the “causation connection” requirement of §1442(a)(1). AI17. Nor do they present any evidence that “any mandatory orders were ever issued to any of these Defendants requiring them to produce Agent Orange on a contract they had not bid for.” Hercules Supply Contract, A332. Without such a mandatory order, their protestations about the possibility of “criminal sanctions” visited upon them are purely theoretical. As the *Maxus* court noted in granting summary judgment against Diamond, Diamond’s relationship with the government was one of “buyer and seller” and any sanctioning power that the government had over Diamond did not exist until Diamond voluntarily bid on and accepted the government’s contract, including the conditions it imposed. *Maxus, Supra.* at 408.

To the extent that Manufacturers make a “compulsion” argument, it relies almost exclusively on a March 24, 1967, letter which was written by Koster five years after the herbicide program began. RIR13. By this time Dow had already entered into nine contracts with the government, Monsanto twenty-two, Diamond seven, and Hercules seven. These included all of the contracts for Agents Pink, Purple,<sup>3</sup> A3935-A3945, and Green which by themselves constituted 40% of the total dioxin sprayed in Vietnam. A6830-A6836, Even Manufacturers cannot argue that Koster’s alleged “directive” compelled the sale of material already sold.

Moreover, even though Manufacturers insist that this letter from Koster, asking for the acceleration of already contracted for deliveries, all by itself commandeered all of their production, Koster 3/24/67 letter, A8049, (“[The Department of Defense ... took over the entire domestic production of 2,4,5-T.” RSGCD111; see also RIR29 ) Koster himself testified that the letter “does not [even] appear to me to be a rated order.” Koster, A8031-A8035. Moreover, Plaintiffs have provided un rebutted expert testimony from this country’s preeminent authority on such government contracts, Professor Ralph Nash, that the 1967 directive had no compulsive effect whatsoever. Nash Affidavit, A6993-

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<sup>3</sup> Certainly, Dow cannot claim to have been compelled to sell Agent Purple to the Government when Dow lured the government into using it and then filed a patent infringement claim against its competitors. AB21-22; A8206.

A6994; AB33.

Nash's affidavit is supported by Dow's own correspondence. Dow voluntarily offered to supply the government far more than the 93,000 gallons per month the government allegedly "directed" and Manufacturers now falsely assert was Dow's entire capacity. RIR13. Dow wrote back to Koster on March 29, 1967, agreeing not only to submit 93,000 gallons per month for four months under the existing open contract, but volunteering an increase to 167,000 gallons beginning August.<sup>4</sup> Dow 3/29/67 letter to Koster. A8051-A8059. Dow's next contract, dated April 17, 1967, did exactly that, promising 1,575,000 gallons to be delivered between May 31, 1967--March 31, 1968. Dow supply contract, A2229-A2268. Ensuing correspondence confirms that Dow entered into this contract voluntarily, as the contract referred to "your [Dow's] offer of wires dated 4 April and 13 April, 1967 and our acceptance dated 17 April, 1967." *Id.* (See Dow's April 17, 1967 supply contract, A2229-A2268, and Dow's Addendum, A5846-7-5846-10.) Dow's next two contracts voluntarily provided well over 93,000 gallons per month. The first, dated March 15, 1968, again was awarded by the government in response to "Dow's telegraphic offer" and provided for 150,000

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<sup>4</sup> The only open contract was DSA-400-67-C1820. A2174-A2190. Dow had already delivered all quantities required under all other contracts. A5846-4 to 5846-10.

gallons to be delivered fifteen days later. Dow supply contract, A2269-A2286. The second, issued as a result of the government's "telegraphic request for proposal dated 29 April 1968", Dow's "telegraphic offer dated 2 May 1968" and "telegraphic acceptance by the government dated 20 May 1968," provided for a whopping 2,000,000 gallons or 222,000 gallons to be shipped per month. Dow supply contract, A2287-A2307. Significantly, Dow's March 29, 1967, letter to Koster stated that the increased product it was offering would not interfere with its "production and sale of Silvex in 1967." Dow 3/28/67 letter to Koster, A8051-A8059. (Silvex, which used most of the same production processes and intermediates as 2,4-5-T, was Dow's newest and most important entry into the civilian herbicide market.) October 1968 correspondence makes it clear that Dow had the capacity to produce 12 million pounds per year of 2,4,5-T, sufficient for 3 million gallons of Agent Orange, however, Dow never contracted with the government for more than 2 million gallons. A8026-A8029.

The other companies followed Dow's lead, as each was readily able to increase their capacity in order to fill their lucrative DOD contracts. For instance, in contrast to RIR14, Hercules was never required to devote the entire production capacity of its Jacksonville plant to the government with respect to herbicide Orange. John Eagan, the director of operations of Hercules' Synthetics

Department, A7998-A7999; see also AB35.

Manufacturers also use the internal memorandum of Edward Upton of TH Agriculture to claim that the full production of their 2,4,5-T was taken by the military. In fact, an examination of TH Agriculture's capacity and its contracts shows that its full capacity for 2,4,5-T was never taken either. In the same document cited by Manufacturers, TH Agriculture states that its maximum production capacity for 2,4,5-T is 3,600,000 pounds per year, which is equivalent to the amount of 2,4,5-T in 900,000 gallons of Agent Orange, or 75,000 gallons per month. A8325-A8326; But neither this nor any of its other government contracts required production anywhere near that level. A10929-A10978,A10979-A11039.

In January 1969 the government actually cancelled deliveries scheduled under existing contracts, as 75,000 drums of Orange accumulated on the docks at Gulfport Mississippi. "At this time, Manufacturer's supplies of raw materials (basic 2,4-D 2,4,5-T esters) used in the manufacture of Orange became the liability of the Government." A5370,A5388.

Alternatively, Manufacturers argue that what was really critical was the fact

that these were “rated” orders,<sup>5</sup> RSGCD51-55, even though many contracts did not contain any ratings at all. AB26-30. In any case, Jane Lewis testified that “ratings” were part of the nature of any military contract. Lewis, A8188-1-A8188-2. A rated order did not compel the government contractor to do anything, it just gave these companies an advantage over their competitors by enabling them to get priority when asking their suppliers for shipments. Lewis, A8188-1. Nor did Lewis indicate at A8190-3 that Manufacturers would have to shut down their plants. RIR30. To the contrary, Lewis testified that she did not even have the power to compel any companies to enter into a contract if they didn’t want to. Lewis, A8176.

Thus, Professor Nash’s opinions are not, as defendants contend, thoroughly refuted by the record, RIR14, but fully supported by it.

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<sup>5</sup> Manufacturers have no basis to argue that the contracts they have lost were “rated.” In *Westmiller v. IMO Industries*, 2005 US Dist Lexis 2932 (W.D.Wash.) the court held that removal under §1442(a)(1) was not appropriate, striking a contractor's affidavit about specifications in a missing contract on the grounds that it violated FRE 1002, the 'best evidence' rule, and held that "absent the actual specifications," conclusory statements about what the specifications would have stated amount to mere speculations and are not admissible. *Id* at \*5. Manufacturers’ missing contracts here have even less basis to justify removal, as instead of relying on “conclusory” employee affidavits to describe the specifications in the missing contracts, Manufacturers rely on the statements of their lawyers.

## **VIII. NO COURT HAS HELD THAT A GOVERNMENT CONTRACTOR CAN REMOVE AN ACTION TO FEDERAL COURT FOR SELLING AN OFF-THE-SHELF PRODUCT**

Manufacturers seek removal for producing the same 2,4,5-T herbicide they sold in vast quantities to commercial customers. (Compare RIR4-8 to AB12-24, AS17-19, AI35-36 and Stephensons' Response Brief, Section VIII) Removal for this reason is inconsistent with the history and purpose of Section §1442(a)(1). See *Willingham* at 405-06; *Colorado v. Symes*, 286 U.S. 510, 517-19 (1932); *Gay v. Ruff*, 292 U.S. 25,32-33 (1934); *Arizona v. Manypenny*, 451 U.S. 232,241-42 (1981). The purpose of §1442(a)(1) is "not hard to discern." *Willingham* at 406. It was never designed to benefit private corporations shopping for a Federal forum which would be constitutionally denied to them when they sell the same injury-causing product commercially. The undertakings of the federal government are so vast that it is constantly contracting with private manufacturers for all manner of products from light bulbs to pencils to herbicides. Under the rule Manufacturers urge, they would gain a Federal forum in a private party lawsuit simply because they sold material to the Federal government. Manufacturers have not denied that they have been sued for domestic exposure to the very same 2,4,5-T contaminant,

dioxin, in scores of state courts around the country. AI52-54.<sup>6</sup> There is no reasoned basis that they should be entitled to select a Federal forum here simply because they exposed American soldiers to the same deadly contaminant as they did hundreds of others around the United States.

**IX. SINCE NO GOVERNMENT SPECIFICATION INCLUDED DIOXIN CONTAMINANTS AND HIGH LEVELS OF DIOXIN WERE ONLY CREATED AS A RESULT OF DEFECTIVE PRODUCTION TECHNIQUES UNDER MANUFACTURERS' EXCLUSIVE CONTROL, MANUFACTURERS CANNOT MEET THE "CAUSAL CONNECTION" REQUIREMENT OF §1442(a)(1)**

Plaintiff Isaacson brought this case because he suffered non-Hodgkin's lymphoma due to his exposure to dioxin-contaminated 2,4,5-T. The dioxin was

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<sup>6</sup> These cases developed vast amounts of discovery about the Manufacturers' production processes and their knowledge of the health effects of their products, particularly dioxin. With the lion's share of discovery in MDL381 directed to the government, discovery of manufacturers in many state court cases, at times brought by Manufacturers' own production workers, was far more extensive than anything undertaken in MDL381. Plaintiffs' requested this discovery, including Monsanto discovery subject to protective orders, as well as the extensive discovery taken by the government in the *Vertac* and *Maxus* cases. The court denied all of these discovery requests, freezing Plaintiffs time of the original MDL settlement, except for a limitation of six depositions in the *Vertac* litigation. Notwithstanding Manufacturers' cavalier dismissal of Plaintiffs' request, RSGCD73n.19, Plaintiffs were entitled to receive from each Manufacturer copies of all depositions of Manufacturers' employees involved in 2,4,5-T production and toxicity evaluation, as well as all documents produced in other litigation but not produced in MDL381. The district court erred by ruling on summary judgment before Plaintiffs were provided with this discovery.

created as an unwanted byproduct of Manufacturers' production process and was never requested nor contemplated in the government's contracts with Plaintiffs. (compare RIR14-15 with AB36-41, AI41-46, AS25-29) and Stepheons' Response Brief, (Sections III, IV and VII). Further, none of the individuals engaged in selecting or purchasing Manufacturers' products were aware of the existence of dioxin in the end product. AB60-62; AS29-47. As such, the requirement that there be a "causal connection between the charged conduct and the asserted official authority" is not met, *Willingham* at 409; AI17, as Judge Weinstein held in *Ryan* at 950-51.

Removal requires a direct causal connection between the act performed under "color of office" and those complained of by Plaintiffs. *Good v. Armstrong World Indus.*, 914 F. Supp. 1125,1128 (E.D.Pa.1996) ("The 'acting under' language" requires a showing of "a causal nexus between the plaintiff's claims and the conduct taken pursuant to direction from a federal officer."); *Akin v. Big Three Indus., Inc.*, 851 F. Supp. 819, 823 (E.D.Tex.1994) (treating "acting under" limitation as a causation requirement); *Freiberg v. Swinerton & Walberg Property Servs., Inc.*, 245 F. Supp. 2d 1144,1149 (D.Colo.2002) ("a sufficient causal nexus between what it has done under asserted official authority and the acts giving rise to state claims" must be demonstrated); *New Jersey Dep't of Env't'l Prot. v. Exxon*

*Mobil Corp.*, 381 F. Supp. 2d 398,404 (D.N.J.2005) (“To establish that it was ‘acting under’ an officer of the United States, Defendant must show a causal nexus between the conduct charged . . . and the acts performed by Defendant at the direction of official federal authority.”).

In the instant case, Plaintiffs do not complain because the government requested that 2,4,5-T be manufactured, but rather because the 2,4,5-T delivered by Manufacturers was contaminated with highly toxic levels of dioxin resulting from Manufacturers’ own production choices, AI50-52. Each of these facts defeats the “causal connection” requirement. Manufacturers do not address this other than through a truncated recitation of ultimate factual conclusions made by Judge Weinstein in *Isaacson*.

This failure to even argue the factual predicates for “causation” reveals the holes in both Manufacturers’ and Judge Weinstein’s “causal connection” analysis, *Isaacson* at 447, made even more striking by Judge Weinstein’s *Ryan* conclusion. Instead of arguing in support of Judge Weinstein, Manufacturers dredge out an isolated quote from the Supreme Court’s 1926 decision in *Maryland v. Soper*, *supra.*, at 33, and argue that it supports their novel contention that they do not have to show that the specific acts that they are sued upon were directed by the government. RIR35. *Soper* dealt with the removal of a state court murder case

against four Prohibition officers and their chauffeur. The quote Manufacturers select was part of the Court's discussion of whether the officers had to admit that they committed the underlying acts which gave rise to the murder charges before removal would be appropriate. What the Court really says in *Soper*, however, is that the "causal connection" requirement does not require that the defendant actually admit that it did the specific acts complained of in the underlying complaint in order for removal to be appropriate. This does not alter the "causal connection" calculus as restated by *Willingham* forty-three years later. Here, Manufacturers can make no realistic claim that the government selected or controlled their sub-standard 2,4,5-T manufacturing technologies or that they provided the government with dioxin in their product pursuant to the government's request.

In the end, Manufacturers posit a broad interpretation of §1442(a)(1) which would allow removal of any claim asserted by them for any acts performed while they were making 2,4,5-T for the government. RIR35. Their argument ignores the fact that any considerations weighing in favor of preserving federal sovereignty simply do not apply when the state suit is not based upon the prosecution of a federal officer but rather a private suit for damages against mass producers of commercial products.

## **XI. CONCLUSION**

The Judgment of the lower court should be reversed. This case should be remanded to the Superior Court of New Jersey.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 6,869 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

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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 reply 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 reply 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 attached to an e-mail addressed to “briefs@ca2.uscourts.gov” and:

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