05-1820-CV

05-1509-CV, 05-1693-CV, 05-1694-CV, 05-1695-CV, 05-1698-CV, 05-2450-CV

To be Argued by:
ANDREW L. FREY

United States Court of Appeals
for the Second Circuit

IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION

JOE ISAACSON AND PHYLLIS LISA ISAACSON

Plaintiffs-Appellants,

v.

DOW CHEMICAL COMPANY; MONSANTO COMPANY; 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 CHEMICALS, INC.; UNIROYAL, INC.; C.D.U. HOLDING, INC.; AND UNIROYAL CHEMICAL CO., INC.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES ON REMOVAL

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DEFENDANTS-APPELLEES' RULE 26.1
CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellees hereby state:

Monsanto Company. Monsanto Company has no publicly owned parent corporation, and no publicly held corporation owns more than 10 percent of Monsanto's stock.

The Dow Chemical Company. The Dow Chemical Company has no parent corporations and no publicly held company owns 10 percent or more of its stock.

Occidental Chemical Corporation. Occidental Chemical Corporation, the successor by merger to Diamond Shamrock Chemicals Company (which was known prior to September 1, 1983 as Diamond Shamrock Corporation), is an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, a publicly held company.

Valero Corporation. Valero Corporation, the successor by merger to Ultramar Diamond Shamrock Corporation, has no parent corporation. Barclays Global Investors, N.A. owns more than 10% of its stock.

Maxus Energy Corporation. Maxus Energy Corporation is an indirect, wholly-owned subsidiary of YPF S.A. ("YPF"). Approximately 99 percent of YPF's stock is owned by Repsol YPF S.A. ("Repsol YPF"). Repsol YPF is

publicly held, and the shares of YPF stock not owned by Repsol YPF are also publicly held.

Tierra Solutions, Inc. Tierra Solutions, Inc., formerly known as Chemical Land Holdings, Inc., is an indirect, wholly-owned subsidiary of YPF S.A. ("YPF"). Approximately 99% of YPF's stock is owned by Repsol YPF S.A. ("Repsol YPF"). Repsol YPF is publicly held, and the shares of YPF stock not owned by Repsol YPF are also publicly held.

Hercules Incorporated. Hercules Incorporated has no parent corporations and no publicly held company owns 10 percent or more of its stock.

Uniroyal, Inc. Uniroyal, Inc. is a dissolved corporation.

C.D.U. Holdings, Inc. C.D.U. Holdings, Inc. is a dissolved corporation.

Uniroyal Chemical Co. Uniroyal Chemical Corp. is wholly owned by the Crompton Corporation, a publicly held company.

TH Agriculture & Nutrition Company, Inc.; Thompson-Hayward Chemical Co.; and Harcros Chemical, Inc. T H Agriculture & Nutrition Company, Inc. (now known as T H Agriculture & Nutrition L.L.C.) is a wholly-owned subsidiary of Philips Electronics North America Corporation, formerly known as North American Philips Corporation. Philips Electronics North America Corporation is an indirect wholly-owned subsidiary of Koninklijke Philips Electronic N.V., a publicly held corporation based in the Netherlands. Thompson-

Hayward Chemical Co. was a former subsidiary of North American Philips Corp., which no longer exists. These assets of Thompson Hayward Chemical Co. were purchased by Harcros Chemical Inc., which is a completely separate entity from Philips Electronics North America Corporation.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ISSUE PRESENTED 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

A. The Government "Invented" Agent Orange 4

B. Federal Officers Required Defendants to Supply Agent Orange Pursuant to Military Specifications 8

1. The Defense Production Act of 1950 9

2. Business and Defense Services Administration Regulations 10

3. The Government Required the Production of Agent Orange 11

C. Federal Officers Made Fully-Informed, Independent Decisions Regarding Dioxin and the Use of Agent Orange in Vietnam 14

STATEMENT OF THE STANDARD OF REVIEW 16

SUMMARY OF ARGUMENT 16

ARGUMENT 18

THE DISTRICT COURT CORRECTLY HELD THAT REMOVAL UNDER SECTION 1442 IS APPROPRIATE IN THIS CASE 18

A. Section 1442(a)(1) Is Interpreted Broadly in Light of Its Protective Purposes 18

TABLE OF CONTENTS

Page

B. Defendants Are "Persons" Within the Meaning of § 1442(a)(1).....20

1. The Vast Majority of Federal Courts Agree That the Word "Person" in § 1442(a)(1) Includes Corporations 20

2. The Text and Relevant Statutory Policy Clearly Call for Construing "Person" to Include Corporations 22

3. *International Primate* Is Inapposite 24

C. The Defendants "Acted Under" Federal Officers 26

1. Defendants Demonstrated the Requisite Causal Nexus Between Federal Authority and The Alleged Tortious Acts 26

2. Plaintiffs' Contention That Defendants Have Not Shown "Compulsion" Is Both Legally Irrelevant and Factually Erroneous 34

3. The Decisions Cited by Plaintiffs Are Inapposite 37

D. This Suit Challenges Actions That Were Taken Under Color of Federal Authority 43

1. The Government Contractor Defense Satisfies the "Under Color of Office" Requirement.....46

2. The Court Should Reject Plaintiffs' Attempts to Graft Additional Requirements Onto the Statute 48

a. "Color of Law" Cases Have No Bearing on Officer Removal 48

b. Invocation of § 1442(a)(1) Does Not Require an Immunity Defense — Any Federal Defense Is Sufficient.....49

TABLE OF CONTENTS

Page

c. Section 1442(a)(1) Also Does Not Limit Removal to Defendants That Were "Enforcing Federal Law" at the Time of the Challenged Act.....52

d. Public Citizen's Policy Arguments in Favor of a Narrow Construction of § 1442(a)(1) Ignore the Clear Language and Purpose of the Statute.....54

CONCLUSION.....58

STATUTORY ADDENDUM.....61

CERTIFICATE OF COMPLIANCE.....62

TABLE OF AUTHORITIES

Page

Cases

Akin v. *Big Three Indus., Inc.*,
851 F. Supp. 819 (E.D. Tex. 1994).....21, 31, 32, 46

Areskog v. *United States*,
396 F. Supp. 834 (D. Conn. 1975).....44

Arizona v. *Manypenny*,
451 U.S. 232 (1981).....19, 55

Arness v. *Boeing N. Am., Inc.*,
997 F. Supp. 1268 (C.D. Cal. 1998) 21-22

Bahrs v. *Hughes Aircraft Co.*,
795 F. Supp. 140 (D. Ariz. 1992) 21

Bakalis v. *Crossland Sav. Bank*,
781 F. Supp. 140 (E.D.N.Y. 1991) 37-38

Barbara v. *N.Y. Stock Exch., Inc.*,
99 F.3d 49 (2d Cir. 1996).....39

Barr v. *Matteo*,
360 U.S. 564 (1959).....19

Boyle v. *United Techs. Corp.*,
487 U.S. 500 (1988).....23, 46, 49

Bradford v. *Harding*,
284 F.2d 307 (2d Cir. 1960)..... 19-20

Broder v. *Cablevision Sys. Corp.*,
418 F.3d 187 (2d Cir. 2005).....16

Brown & Williamson Tobacco Corp. v. *Wigand*,
913 F. Supp. 530 (W.D. Ky. 1996).....38

TABLE OF AUTHORITIES
(continued)

Page

Cases (cont'd)

California v. *Mesa*,
813 F.2d 960 (9th Cir. 1987) 50

Camacho v. *Autoridad de Telefonos de Puerto Rico*,
868 F.2d 482 (1st Cir. 1989).....27

Central Va. Cmty. Coll. v. *Katz*,
126 S. Ct. 990 (2006).....49

Church of Scientology v. *United States Dept. of Justice*,
612 F.2d 417 (9th Cir. 1979) 22

Colorado v. *Symes*,
286 U.S. 510 (1932).....19

Crocker v. *Borden, Inc.*,
852 F. Supp. 1322 (E.D. La. 1994).....21, 31, 32, 46

Dow Chem. Co. v. *Ryan*,
No. 92-8008 (2d Cir., May 8, 1992) 33

Dow Chem. Co. v. *Stephenson*,
539 U.S. 111 (2003).....3

Eastern Air Lines, Inc. v. *McDonnell Douglas Corp.*,
532 F.2d 957 (5th Cir. 1976) 11, 37

Freiberg v. *Swinerton & Walberg Prop. Servs., Inc.*,
245 F. Supp. 2d 1144 (D. Colo. 2002).....31

Fung v. *Abex Corp.*,
816 F. Supp. 569 (N.D. Cal. 1992).....31, 32, 46

Good v. *Armstrong*,
914 F. Supp. 1125 (E.D. Pa. 1996).....21

TABLE OF AUTHORITIES
(continued)

Page

Cases (cont'd)

Group Health, Inc. v. *Blue Cross Assoc.*,
587 F. Supp. 887 (S.D.N.Y. 1984) 21

Gualandi v. *Adams*,
385 F.3d 236 (2d Cir. 2004).....16

Guckin v. *Nagle*,
259 F. Supp. 2d 406 (E.D. Pa. 2003) 21

Guillory v. *Ree's Contract Serv., Inc.*,
872 F. Supp. 344 (S.D. Miss. 1994) 21, 46

Gurda Farms v. *Monroe County Legal Assistance Corp.*,
358 F. Supp. 841 (S.D.N.Y. 1973) 26-27, 28

Hercules Inc. v. *United States*,
516 U.S. 417 (1996)..... 29, 47-48

Hill Parents Assoc. v. *Giaimo*,
287 F. Supp. 98 (D. Conn. 1968).....55

In re "Agent Orange" Prod. Liab. Litig.,
565 F. Supp. 1263 (E.D.N.Y. 1983) 15, 47

In re "Agent Orange" Prod. Liab. Litig.,
597 F. Supp. 740 (E.D.N.Y. 1984),
aff'd, 818 f.2d 145 (2d Cir. 1987).....8, 15

In re "Agent Orange" Prod. Liab. Litig.,
818 F.2d 187 (2d Cir. 1987).....53

International Primate Protection League v. *Admins. of Tulane Educ. Fund*,
500 U.S. 72 (1991).....24, 25

TABLE OF AUTHORITIES
(continued)

Page

Cases (cont'd)

Isaacson v. *Dow Chem. Co.*,
304 F. Supp. 2d 404 (E.D.N.Y. 2004) ..... *passim*

Isaacson v. *Dow Chem. Co.*,
304 F. Supp. 2d 442 (E.D.N.Y. 2004) ..... *passim*

Jamison v. *Wiley*,
14 F.3d 222 (4th Cir. 1994) 54

Jefferson County v. *Acker*,
527 U.S. 423 (1999)..... *passim*

Johnson v. *Busby*,
520 F. Supp. 751 (D. S.D. 1981) 35

Jones v. *Three Rivers Elec. Coop.*,
166 F.R.D. 413 (E.D. Mo. 1996) 21

Jund v. *Town of Hempstead*,
941 F.2d 127 (2d Cir. 1991).....22

Kaplansky v. *Assoc. YM-YWHAs*,
No. 88-1292, 1989 WL 29938 (E.D.N.Y. Mar. 27, 1989) 38

Kolibash v. *Comm. on Legal Ethics*,
872 F.2d 571 (4th Cir. 1989) 43-44

Krangel v. *Crown*,
791 F. Supp. 1436 (S.D. Cal. 1992).....21

Louisiana v. *Sparks*,
978 F.2d 226 (5th Cir. 1992) 20, 56

Madden v. *Able Supply*,
205 F. Supp. 2d 695 (S.D. Tex. 2002) 21

TABLE OF AUTHORITIES
(continued)

Page

Cases (cont'd)

Malone v. *Longo*,
463 F. Supp. 139 (S.D.N.Y. 1979) 35, 44, 55

Maryland v. *Soper*,
270 U.S. 9 (1926).....35

Maxus Energy Corp. v. *United States*,
898 F. Supp. 399 (N.D. Tex. 1995),
aff'd, 95 F.2d 1148 (5th Cir. 1996).....36, 41

McAboy v. *IMO Indus., Inc.*,
2005 U.S. Dist. LEXIS 29387 (W.D. Wash. Oct. 27, 2005).....27

Mesa v. *California*,
489 U.S. 121 (1989)..... *passim*

Mignogna v. *Sair Aviation, Inc.*,
937 F.2d 37 (2d Cir. 1991).....26

Miller v. *Diamond Shamrock Co.*,
275 F.3d 414 (5th Cir. 2001) 21, 29, 33, 46, 47

Mizuna, Ltd. v. *Crossland Fed. Savings Bank*,
90 F.3d 650 (2d Cir. 1996).....39

Moreland v. *Van Buren GMC*,
93 F. Supp. 2d 346 (E.D.N.Y. 1999) 20

Noble v. *Employers Ins. of Wausau*,
555 F.2d 1257 (5th Cir. 1977) 27

Pack v. *AC&S, Inc.*,
838 F. Supp. 1099 (D. Md. 1993).....21, 28, 31, 32, 46

TABLE OF AUTHORITIES
(continued)

Page

Cases (cont'd)

Pani v. *Empire Blue Cross Blue Shield*,
152 F.3d 67 (2d Cir. 1998).....21, 23

Philips v. *Saratoga Harness Racing, Inc.*,
240 F.3d 174 (2d Cir. 2001).....16

Poss v. *Lieberman*,
299 F.2d 358 (2d Cir. 1962).....19

Reed v. *Fina*,
995 F. Supp. 705 (S.D. Tex. 1998).....21, 31

Roxford Knitting Co. v. *Moore & Tierney, Inc.*,
265 F. 177 (2d Cir. 1920).....37

Ruffin v. *Armco Steel Corp.*,
959 F. Supp. 770 (S.D. Tex. 1997)..... 22-23

Ryan v. *Dow Chem. Co.*,
781 F. Supp. 934 (E.D.N.Y. 1992)..... *passim*

Screws v. United States,
325 U.S. 91 (1945)..... 48-49

Stephenson v. *Dow Chem. Co.*,
273 F.3d 249 (2d Cir. 2001).....3

Stephenson v. *Dow Chem. Co.*,
346 F.3d 19 (2d Cir. 2003).....3

Sun Buick, Inc. v. *Saab Cars USA, Inc.*,
26 F.3d 1259 (3d Cir. 1994).....20

Syngenta Crop Protection, Inc. v. *Henson*,
537 U.S. 28 (2002).....3

TABLE OF AUTHORITIES
(continued)

Page

Cases (cont'd)

Tennessee v. *Davis*,
100 U.S. 257 (1879).....51

Thompson v. *Cmty. Ins. Co.*,
1999 U.S. Dist. LEXIS 21725 (S.D. Ohio 1999) 21

Torres v. *CBS News*,
854 F. Supp. 245 (S.D.N.Y. 1994) 45

United States v. *Vertac Chem. Corp.*,
841 F. Supp. 884 (E.D. Ark. 1993),
aff'd, 46 F.3d 803 (8th Cir. 1995).....40, 41, 42

Virden v. *Altria Group, Inc.*,
304 F. Supp. 2d 832 (N.D. W.Va. 2004).....21, 31-32, 37-38

Ward v. *Congress Constr. Co.*,
99 F. 598 (7th Cir. 1900) 27

Watson v. *Philip Morris Cos., Inc.*,
420 F.3d 852 (8th Cir. 2005) 38

Williams v. *Brantley*,
492 F. Supp. 925 (W.D.N.Y. 1980),
aff'd, 738 F.2d 419 (2d Cir. 1984).....45

Williams v. *General Elec. Co.*,
2005 WL 2035352 (M.D. Pa., Aug. 22, 2005) 39

Willingham v. *Morgan*,
395 U.S. 402 (1969)..... *passim*

Winters v. *Diamond Shamrock Chem. Co.*,
149 F.3d 387 (5th Cir. 1998) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page

Statutes

1 U.S.C. § 1 ..... 22, 26

28 U.S.C. § 76 48

28 U.S.C. § 1441 20

28 U.S.C. § 1442 ..... *passim*

42 U.S.C. § 9607(a)(2) 40

42 U.S.C. § 9607(a)(3) 41

50 U.S.C.A. App. §§ 2061 *et seq.* 9-10

50 U.S.C.A. App. § 2071(a) 9-10

Other Authorities

15 Fed. Reg. 6105 (Sept. 9, 1950) 10

18 Fed. Reg. 6503 (Oct. 10, 1953) 10

Pub. L. No. 104-317, 110 Stat. 3847 24

Commerce Dept. Org. Order 40-1A (Sept. 15, 1970) 10

BDSA Regulation 2, 32A C.F.R. Ch. VI § 10 (1967) 10-11

Note, *The Defense Production Act: Choice as to Allocations*, 51 COLUM. L. REV. 350 (1951) 10

Comment, *The Government Contract Defense After* Boyle v. United Techs. Corp., 41 BAYLOR L. REV. 291 (1989) 23

RICHARD H. FALLON, JR. ET AL., HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003) 18, 46, 51

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities (cont'd)

WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE:
JURISDICTION 3d § 3727 (1998)..... *passim*

PRELIMINARY STATEMENT

In the midst of the Vietnam War, the United States military adopted a carefully considered strategy of targeted aerial herbicide spraying to prevent enemy forces from concealing themselves in the jungle and ambushing American, South Vietnamese, and other allied soldiers. That strategy is credited with saving the lives of thousands of allied troops. To ensure that military personnel would not be endangered by a shortage of the specific herbicides that had been researched, designed, and developed by the government, the United States invoked the Defense Production Act and compelled cooperation from the chemical manufacturers who are named as defendants in these actions.

Having removed these suits to federal court, and having won summary judgment below on the basis of the government contractor defense, the defendants now ask this Court to reaffirm their right to defend against the plaintiffs' claims in a federal forum, pursuant to a removal statute that has been applied and broadened over nearly two centuries. The purpose of the federal officer removal statute, 28 U.S.C. § 1442(a)(1), is to prevent potentially hostile state courts from thwarting federal law and impeding the operations of the federal government. Section 1442 does so by allowing a person who is sued for actions taken on behalf of the federal government to remove the case to a federal forum.

ISSUE PRESENTED

Whether the defendants, who manufactured the herbicide Agent Orange, pursuant to precise government specifications, for use by the United States Government during the Vietnam War, were entitled to remove this action to federal court pursuant to 28 U.S.C. § 1442(a)(1) as persons acting under federal officers and claiming a federal defense.

STATEMENT OF THE CASE

The present defendants entered into a global class settlement in 1984 that covered all Agent Orange-related claims of military veterans and their families. The suits addressed in this brief were brought in various state courts, beginning in 1998. Defendants removed the cases to federal court, and the Panel on Multi-District Litigation transferred them, as well as the federal cases that are also currently on appeal, to the Eastern District of New York, where they were consolidated before the Hon. Jack B. Weinstein. Judge Weinstein ruled that the All Writs Act established federal jurisdiction in one of those cases (*Isaacson*) and then dismissed it and *Stephenson* on the ground that they presented an impermissible collateral attack on the 1984 settlement.

On appeal, this Court affirmed the finding of federal jurisdiction but reversed the dismissal, holding that veterans whose injuries did not manifest themselves until after the settlement fund was exhausted in 1994 had not been

adequately represented by class counsel in the original settlement and therefore were not bound by it. *Stephenson* v. *Dow Chem. Co.*, 273 F.3d 249, 256-57, 260-61 (2d Cir. 2001). An evenly divided Supreme Court affirmed this Court's ruling as to dismissal of *Stephenson* but vacated and remanded the *Isaacson* decision as to jurisdiction for reconsideration in light of *Syngenta Crop Protection, Inc.* v. *Henson*, 537 U.S. 28 (2002). *Dow Chem. Co.* v. *Stephenson*, 539 U.S. 111 (2003) (per curiam). This Court then concluded that *Syngenta* barred All Writs Act jurisdiction in *Isaacson*; it remanded for a determination of whether alternative bases for jurisdiction were present. *Stephenson* v. *Dow Chem. Co.*, 346 F.3d 19 (2d Cir. 2003).

In February 2004, Judge Weinstein denied plaintiff Isaacson's motion to remand, finding federal jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). *Isaacson* v. *Dow Chem. Co.*, 304 F. Supp. 2d 442 (E.D.N.Y. 2004). On March 2, 2005, Judge Weinstein issued an order denying remand of all other cases in this appeal that had been removed from state court. This brief addresses the challenges of each of those plaintiffs to the denial of remand. Because federal officer removal focuses on the relationship between the defendant and the federal government, there are no material differences of fact among those cases that pertain to the propriety of removal.

STATEMENT OF FACTS

The district court summarized its key findings of fact supporting removal at 304 F. Supp. 2d at 449-50. In addition, it incorporated by reference its extensive exposition of undisputed facts for purposes of the government contractor defense as findings of fact with respect to removal jurisdiction. 304 F. Supp. 2d at 445. The following statement sets forth the key findings of fact made by Judge Weinstein and demonstrates that those findings, far from being clearly erroneous (see p. 15-16 *infra*), are fully supported by the undisputed record. We also incorporate by reference the statement of facts in defendants' brief in the *Stephenson et al.* appeals (the "GCD Brief").

A. The Government "Invented" Agent Orange.

The district court made the following findings of fact regarding the origins of Agent Orange.

> The herbicidal properties of 2,4-D and 2,4,5-T as a munition were discovered in research conducted by the United States military during World War II. During the 1950s and 1960s, the United States armed forces developed these compounds as weapons of war, conducting extensive testing and experimentation involving applications of high concentrations of these materials at heavy rates to defoliate large areas indiscriminately as rapidly as possible.

Isaacson v. *Dow Chem. Co.*, 304 F. Supp. 2d 404, 426 (E.D.N.Y. 2004).

> After the testing of many different herbicides, the military concluded that a mixture of the butyl esters of 2,4-D and 2,4,5-T was most effective for military defoliation purposes. Federal officers determined through government specifications that the "formulation"

> for Agent Orange would be a 50/50 mix of the n-butyl esters of 2,4-D and 2,4,5-T. The government determined that "extremely high dose rates" of these undiluted herbicides were required for effective military use.
>
> ***
>
> *** The herbicidal properties of 2,4-D and 2,4,5-T were explored in research conducted by the United States military during World War II. ***
>
> As the Court of Appeals for the Fifth Circuit concluded in *Winters* and *Miller*, the Agent Orange supplied to the government was not a ready-to-order, preexisting or off-the-shelf chemical mixture.

304 F. Supp. 2d at 449-50.

All of those findings are amply supported by the record. Agent Orange had its origins in research instituted by the Chemical Warfare Service during World War II at Camp Detrick, Maryland to develop anti-plant agents. 11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 1 at 7 (A610). By 1945, federal officers at Camp Detrick had synthesized and screened about 1,100 substances. They determined that two had "outstanding herbicidal properties": 2,4-dichlorophenoxyacetic acid ("2,4-D") and 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T"). *Ibid.* The discovery was kept classified during the war, but government scientists at Camp Detrick published their findings in 1946. *Ibid.*

Thereafter, chemical companies began selling diluted forms of 2,4-D and 2,4,5-T as commercial herbicides, while government scientists at Camp Detrick continued to research the efficacy and means of dissemination of various forms of

those chemicals with the aim of developing a militarily effective defoliant. *Ibid.*; 11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 2 (A671-A729). Military and civilian herbicides were designed with different goals in mind. While commercial researchers focused on developing herbicides that would kill weeds and brush without harming nearby crops or other vegetation, military researchers wanted chemicals that could defoliate a wide range of plant species to eliminate visual cover for hostile forces.

By 1951, scientists at Camp Detrick had determined that the *n*-butyl esters of 2,4-D and 2,4,5-T were most effective for military purposes. 11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 1 at 8 (A611). Two characteristics that stood out were their effectiveness in "canopy penetration in the dense jungles" (*id.*, Ex. 2 at 18 (A688)) and their rapid penetration of the wax covering of leaves, which ensured that the chemicals would not wash off in the rain. *Id.* at 18, 22 (A621, A625).

When the United States became increasingly involved in the Vietnam conflict in the early 1960s, Dr. James Brown at Fort Detrick was ordered to conduct initial testing of defoliants. He sought to obtain the "chemicals of choice" — *n*-butyl 2,4-D and *n*-butyl 2,4,5-T — but these "could not be obtained on the open market." 11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 1 at 9 (A612). Testing proceeded with "less active commercial substitutes." *Ibid.* In addition, the

commercial spray equipment used was judged "inadequate" because it could not achieve the higher application rates required in military operations. *Ibid.* Dr. Brown concluded that the testing "demonstrated that, with suitable spray systems and the more potent chemicals of choice (*n*-butyl 2,4-D and 2,4,5-T), militarily significant defoliation could be accomplished in Vietnam." *Ibid.*

The military continued research and testing to identify more effective defoliants and herbicides for use in Vietnam. From August 1961 to June 1963, military scientists at Fort Detrick screened 1,410 additional compounds. The two-stage screening experiment ultimately identified 37 active defoliants and 29 active herbicides. 11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 5 at 3 (A772). Ultimately, however, *n*-butyl 2,4-D and 2,4,5-T, remained the "agents of choice."

Other military scientists conducted additional testing in Thailand in 1964 and 1965 "to determine the effectiveness of aerial applications of Purple, Orange, and other candidate chemical agents in defoliation of upland jungle vegetation representative of Southeast Asia." 11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 6 at 3 (A885). The resulting data were used for "comparative evaluation of defoliant chemicals in relation to rate, volume, season of application, canopy penetration, and vegetation response." *Ibid.* Agents Orange, Purple, and Blue were found to be the most effective, and the high application rates of Agent Orange were deemed best to achieve effective, efficient, and long-lasting

defoliation meeting military objectives. A formulation similar to what became known as Agent White was identified as promising but required further testing. None of the other candidate chemical agents proved superior to Agent Orange, which was composed of a 50/50 mix of *n*-butyl 2,4-D and 2,4,5-T.

The results of this military testing decisively shaped military herbicide strategy and tactics for the duration of the herbicide program in Vietnam. The military specifications prepared for Agent Orange required the *n*-butyl esters of 2,4-D and 2,4,5-T in undiluted form, without inert ingredients. 11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 7 (1/29/1992 Gordon Aff.) ¶ 6 (A394); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 848 (E.D.N.Y. 1984) ("the government 'invented' Agent Orange"), aff'd, 818 F.2d 145 (2d Cir. 1987). In contrast, defendants' commercial products contained 2,4-D and 2,4,5-T diluted by substantial amounts of inert ingredients. See, *e.g.*, 11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 7 (1/29/1992 Gordon Aff.) ¶ 4 (A393). See also GCD Brief at 112-13.

B. Federal Officers Required Defendants to Supply Agent Orange Pursuant to Military Specifications.

The district court made the following findings of fact regarding the extent to which the government directed the manufacture of Agent Orange:

> Commencing in 1961, defendants produced and delivered Agent Orange to the United States pursuant to numerous contracts entered into with the Defense General Supply Center, the Defense

> Fuel Supply Center, the United States Army or the United States Air Force. The contracts set forth or incorporated by reference detailed specifications for the herbicide. Those specifications were promulgated by the government. A government directive issued pursuant to Section 101 of the Defense Production Act of 1950 commandeered the United States industry's entire capacity to manufacture 2,4,5-T, ordering defendants to accelerate the delivery of Agent Orange. See, *e.g.*, *Hercules Inc.* v. *United States*, 516 U.S. 417, 419 (1996) ("The military prescribed the formula and detailed specifications for manufacture.").

304 F. Supp. 2d at 449. The government also ordered that the entire domestic supply of tetrachlorobenzene ("TCB"), an essential precursor to 2,4,5-T, be directed to Agent Orange production. Judge Weinstein concluded that, as a result,

> even assuming arguendo that Diamond had the opportunity under the Defense Production Act to refuse to accept the Directive, as a practical matter such an opportunity would have been meaningless: Diamond would have been forced to close its Plant because the United States controlled all access to the starting ingredient needed for production of any 2,4,5-T.

304 F. Supp. 2d at 425.

The record amply supports these findings.

1. The Defense Production Act of 1950

The Defense Production Act of 1950 granted the President the power "to require acceptance and performance" of "contracts or orders" deemed "necessary or appropriate to promote the national defense." 50 U.S.C.A. App. §§ 2061 *et seq.*, 2071(a). The President could "require acceptance and performance of such contracts or orders *** by any person he finds to be capable of their performance."

Ibid. This grant of power was recognized as "a sweeping delegation of power" that gave the President "powers broader than those granted in World War II." Note, *The Defense Production Act: Choice as to Allocations*, 51 COLUM. L. REV. 350, 350 & n.2 (1951).

2. Business and Defense Services Administration Regulations

The day after the Defense Production Act became law, the President delegated the bulk of his authority under the Act to the Secretary of Commerce. Exec. Order No. 10161, 15 Fed. Reg. 6105 (Sept. 9, 1950). The Business and Defense Services Administration ("BDSA") exercised the powers of the Secretary of Commerce from 1953 through 1970. 18 Fed. Reg. 6503 (Oct. 10, 1953); Dept. Org. Order 40-1A (Sept. 15, 1970).

BDSA Regulation 2, Basic Rules of the Priorities System, established the system of rated orders under which the Agent Orange contracts were subsequently issued. 32A C.F.R. Ch. VI § 10 (BDSA 1967) (11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 10 (A905-10)). The law required that "[e]very order bearing a rating ***must be accepted and filled*** regardless of existing contracts and orders except as provided in this section ***." BDSA Reg. 2 § 10 (A907) (emphasis added). BSDA regulations also allowed the government to issue "mandatory directives" that would supersede even rated orders. BDSA Reg. 2 §16 (A909) ("Section 16"). Section 16 provides: "Every person shall comply with each

mandatory order and directive issued to him by [BDSA]. Mandatory orders and directives issued by [BDSA] take precedence over rated orders previously or subsequently received, unless a contrary instruction appears in the mandatory order or directive." In contrast to rated orders, which often were used to allow a military contractor to demand precedence over their civilian counterparts when dealing with third parties, military directives simply ordered a specific plant to deliver a specific product at a particular time. *Eastern Airlines, Inc.* v. *McDonnell Douglas Corp.*, 532 F.2d 957, 980-89 (5th Cir. 1976).

Failure to comply with a rated order or directive would have resulted in serious consequences. Section 27 provides that violation of BDSA Reg. 2 is a crime punishable by fine or imprisonment. 11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 10 (A910) (BDSA Reg. 2 § 27 ("Section 27")). Section 27 further provides that "an injunction and order may be obtained *** enforcing compliance" with any provision of Reg. 2, including both rated orders and directives. These provisions continued in force throughout the period during which defendants supplied Agent Orange.

3. The Government Required the Production of Agent Orange.

Virtually all of the defendants' contracts with the government to produce Agent Orange were rated. See 11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 11 at ¶ 3 (A912) (Dow); Ex. 12 ¶¶ 8-9 (A917-18) (Diamond); Ex. 13 at Ex. A

(A2616-18) (Hercules); Ex. 14 ¶¶ 7-9 (A935-36) (Monsanto). Because "[e]very order bearing a rating must be accepted and filled," BDSA Reg. 2 § 10 (A907), the rated orders required defendants to accept the contracts and produce Agent Orange for the government under penalty of law. The fact that there was competitive bidding on a few early, non-rated contracts has no bearing on either the government's powers or defendants' obligations in connection with the rated orders.

When a shortage of Agent Orange developed in late 1966 despite the use of rated orders, the government initiated even stronger measures to meet anticipated military requirements. See 10/27/2004 Krohley Aff., Ex. 3 at 133 (A2205). On January 26, 1967, Secretary of Agriculture Orville Freeman wrote Secretary of Defense Robert McNamara expressing concern for reduced crop yields and hardships for farmers: increasing military use in Vietnam was depleting herbicide stocks for domestic agricultural use. Secretary Freeman suggested allocating existing herbicide stocks between civilian and military uses. McNamara disagreed and instead asked the White House "to allocate all commercial production capacity for agent orange and its critical components to military use." *Ibid.* In March 1967, the BDSA issued mandatory directives that effectively seized the entire domestic production capacity for 2,4,5-T as raw material for production of Agent Orange. A Commerce Department official informed Edwin Upton of Thompson-Hayward of

the exceptional nature of this action: "this was the first time the entire production of a chemical had been taken by the military. The matter was discussed and resolved finally by an executive order of the White House." 1/22/2004 Defs.' Supp. Reply Br. in Opp. to Remand, Ex. 3 at 3 (A1325). The government told Upton that his company "would be required by law to divert [its] entire production *** to the military," and that "Lt. Col. Hinson would negotiate a contract with Thompson-Hayward." *Ibid*.

In the spring of 1967, each Agent Orange manufacturer received a directive requiring that its entire plant capacity be used for production of Agent Orange. This directive ensured that any spare capacity that might remain after filling each month's contract quantity would also be devoted to military production. See, *e.g.*, 11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 17 (A967). BDSA Directive 28500-1, issued to Dow, specifically states that "pursuant to Section 101 of the Defense Production Act of 1950," "you are hereby directed to accelerate the delivery of your existing DO rated orders for the defoliant 'Orange' to a monthly rate of 93,000 gallons beginning April 3, 1967." *Ibid*. The directive further stated that Dow's "capacity for the production of 'Orange'" was 93,000 gallons per month as of April 3, 1967. *Ibid.* Dow was thus directed to deliver Agent Orange to the government at a rate equal to its entire production capacity. Dow immediately froze existing stocks of 2,4,5-T herbicides. Management informed

the sales force: "You now have approval to tell salesmen and customers the cause of this action which is military direct orders for entire US 245-T capacity." 1/22/2004 Defs.' Supp. Reply Br. in Opp. to Remand, Ex. 4 (A1326). Diamond likewise received orders representing its full 2,4,5-T production capacity, both before and after the expansion of its Newark plant. 11/10/2003 Gordon Aff., Exs. 6, 11-13 (A968-73). Hercules as well was required to sell the government its entire production (10/27/2004 Krohley Aff. at ¶ 48 (A1485) (citing 4/20/1983 Frawley Aff. ¶¶ 3, 6 (A2624-25))), as was Monsanto. 10/28/2004 Sabetta Aff., Ex. 1 (12/10/91 McCarville Aff.) ¶¶ 9-11 (A935-36).

In sum, the tentative conclusion of plaintiffs' expert Ralph Nash that shipments of Agent Orange after March 24, 1967 "appear to have been entered into as a result of normal procurement practices" (PA6989[1]), is thoroughly refuted by the record.

C. Federal Officers Made Fully-Informed, Independent Decisions Regarding Dioxin and the Use of Agent Orange in Vietnam.

The district court made the following findings of fact with regard to the government's informed control over the way in which Agent Orange was used in Vietnam:

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[1] "PA" citations are to the plaintiffs' combined appendix.

> Here, the government ordered specifications that differed from defendants' commercial applications. In addition, the method of warning and application was completely in the government's hands.
>
> The 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.

> The government designed, controlled, and supervised the production of Agent Orange as a product vital to the prosecution of the war in Vietnam.

Id. at 449. Once again, Judge Weinstein's findings are fully supported by the record.

In 1961, President Kennedy approved a joint recommendation of the Departments of State and Defense to initiate defoliation in Vietnam. See *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. at 775; 11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 15 at 9-22, 66-67 (A939-54). Decisions regarding the use of Agent Orange were made by Secretary of Defense McNamara, General Westmoreland, and members of the President's Science Advisory Committee. See *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263, 1266-68 (E.D.N.Y. 1983); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. at 775-77, 795-99; 11/10/2003 Defs.' Supp. Br. in Opp. to Remand, Ex. 15 at 103-104, 133-36, 145-48 (A955-64). The decision to cease use of Agent Orange was also made at the

highest levels of the Defense Department. 10/27/2004 Krohley Aff., Ex. 3 at 166-67 (A2222).

STATEMENT OF THE STANDARD OF REVIEW

The district court's denial of a motion to remand is reviewed *de novo*. *Broder* v. *Cablevision Sys. Corp.*, 418 F.3d 187, 193-94 (2d Cir. 2005). The court's findings of fact as to subject matter jurisdiction, however, are reviewed only for clear error. See *Gualandi* v. *Adams*, 385 F.3d 236, 240 (2d Cir. 2004); *Philips* v. *Saratoga Harness Racing, Inc.*, 240 F.3d 174, 177 (2d Cir. 2001) ("When reviewing a district court's determination of its subject matter jurisdiction, we review factual findings for clear error and legal conclusions de novo.") (citation omitted).

SUMMARY OF ARGUMENT

The federal removal statute, 28 U.S.C. § 1442(a)(1), grants a federal forum for actions brought against "any person acting under [a federal] officer *** for any act under color of such office." The statute is construed broadly, and this case squarely implicates its purpose of guaranteeing a federal forum in which to defend acts that were taken at the federal government's behest: the defendants manufactured Agent Orange at the direction of the United States government for its use in the Vietnam War, and one of the chief arguments against the imposition of tort liability for that conduct is the government contractor defense.

Accordingly, every federal judge to have considered the issue has held that claims arising from the manufacture and sale of Agent Orange can be removed to federal court.

Faced with the statute's clear language and the unanimous view of the courts that federal officer removal is applicable in this context, the plaintiffs present a series of creative, but utterly baseless, arguments. First, they contend that a corporation is not a "person" within the meaning of § 1442(a)(1). But the proposition that the term "person" includes corporations as well as natural persons, both as a general matter and in this particular context, is so well-established as to be beyond serious dispute. Moreover, the government frequently depends on corporate contractors to get its business done, and it would be illogical and wholly at odds with the statutory purpose to confine § 1442(a)(1) removal to individuals.

Second, plaintiffs argue that the defendants were not "acting under" a federal officer when they produced Agent Orange. That contention is likewise untenable. Not only did the government specify the formula, packaging, and labeling of the Agent Orange supplied by the defendants, and not only was this formulation uniquely designed for use by the United States military and without non-governmental use, but the defendants produced Agent Orange pursuant to mandatory government orders, enforceable by criminal penalties, and the government secured raw materials for the manufacturers' use.

Finally, the military officers who directed the production of Agent Orange for use in Vietnam plainly were acting under color of federal law, and the government contractor defense — which was endorsed by the Supreme Court as a matter of federal common law — provides ample grounds for Article III jurisdiction.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT REMOVAL UNDER § 1442 IS APPROPRIATE IN THIS CASE.

A. Section 1442(a)(1) Is Interpreted Broadly in Light of Its Protective Purposes.

Section 1442(a)(1) has three elements: the statute permits removal of suits against "[1] any person [2] acting under [a federal] officer *** [3] for any act under color of such office." The statute is phrased "in sweeping terms." RICHARD H. FALLON, JR. ET AL., HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 908 (5th ed. 2003). Both the language and the legislative history mandate a broad construction.

In enacting the federal officer removal provision, Congress was concerned with "protect[ing] federal officers from interference by hostile state courts," especially in matters of national defense. *Willingham* v. *Morgan*, 395 U.S. 402, 405-406 (1969). As this Court has explained of the predecessor to § 1442(a)(1), removal in such cases serves a compelling federal interest:

> Where a federal officer asserts a privilege for acts done under color of his office[,] the defense is based upon a federal right, the purpose of which is to prevent federal employees from being unduly harassed by 'vindictive or ill founded damage suits brought on account of action taken in the exercise of their official responsibilities.' Consequently, the federal government has a special interest in such matters which justifies the granting of removal jurisdiction to the federal courts in such cases.

Poss v. *Lieberman*, 299 F.2d 358, 359 (2d Cir. 1962) (citing *Barr* v. *Matteo*, 360 U.S. 564, 564-65 (1959)).

Given the significance of this interest, the Supreme Court consistently has "rejected a 'narrow, grudging interpretation of the statute.'" *Jefferson County* v. *Acker*, 527 U.S. 423, 431 (1999) (quoting *Willingham*, 395 U.S. at 407). See also *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981); *Colorado* v. *Symes*, 286 U.S. 510, 517 (1932).

Thus, this Court has held that a single defendant may remove under § 1442 even if other defendants object, contrary to usual removal practice, because the strong policy considerations underlying § 1442 "require a construction in favor of removal." *Bradford* v. *Harding*, 284 F.2d 307, 310 (2d Cir. 1960). The Court explained:

> [1442 removal] rests upon far stronger considerations of policy [than removal under Section 1441]. Section 1441 relates to the rights of individuals. Section 1442, although dealing with individuals, vindicates also the interests of government itself; upon the principle that it embodies "may depend the possibility of the general government's preserving its own existence." *State of Tennessee* v. *Davis*, 1880, 100 U.S. 257, 262.

284 F.2d at 309-10. See also *Louisiana* v. *Sparks*, 978 F.2d 226, 232 (5th Cir. 1992); WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3d § 3727 (1998).[2] With this interpretive principle in mind, we review the elements of § 1442(a)(1) in turn.

B. Defendants Are "Persons" Within the Meaning of § 1442(a)(1).

1. The Vast Majority of Federal Courts Agree that the Word "Person" in § 1442(a)(1) Includes Corporations.

Plaintiff Isaacson halfheartedly suggests, and his amicus Public Citizen argues (Pub. Cit. Br. 6-11) that because the defendants are corporations, they may not avail themselves of § 1442(a)(1) removal.[3] But the federal courts are virtually unanimous in holding that corporations are "persons" within the meaning of the statute. See, *e.g.*, *Winters* v. *Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998) ("We have previously held that corporate entities qualify as 'persons' under § 1442(a)(1)."); *Ryan* v. *Dow Chem. Co.*, 781 F. Supp. 934, 946-47 (E.D.N.Y. 1992); see also WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND

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[2] The broad construction of § 1442 stands in striking contrast to the restrictive reading of 28 U.S.C. § 1441, the general removal statute. See *Moreland* v. *Van Buren GMC*, 93 F. Supp. 2d 346, 350 & n.1 (E.D.N.Y. 1999); *Sun Buick, Inc.* v. *Saab Cars USA, Inc.*, 26 F.3d 1259, 1262 (3d Cir. 1994).

[3] All Isaacson says on this point, without elaboration, is that it is "more persuasive and consistent with Congressional intent" to read "person" to mean "natural person." Isaacson Br. 25.

PROCEDURE: JURISDICTION 3D § 3727.[4] This point is so uncontroversial that in many cases the courts of appeals, including this one, have upheld removals by corporations under § 1442(a)(1) without even questioning whether they were "persons" within the meaning of the statute. See, *e.g.*, *Pani* v. *Empire Blue Cross Blue Shield*, 152 F.3d 67, 70 (2d Cir. 1998); *Miller* v. *Diamond Shamrock Co.*, 275 F.3d 414, 417 (5th Cir. 2001). Amicus Public Citizen's argument (Br. 6-11) that "corporations *** are not 'persons' qualified to invoke the [removal] statute," simply ignores the overwhelming weight of authority on this question.[5]

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[4] Other cases to the same effect include *Guckin* v. *Nagle*, 259 F. Supp. 2d 406 (E.D. Pa. 2003); *Madden* v. *Able Supply*, 205 F. Supp. 2d 695 (S.D. Tex. 2002); *Thompson* v. *Cmty. Ins. Co.*, 1999 U.S. Dist. LEXIS 21725 (S.D. Ohio 1999); *Reed* v. *Fina*, 995 F. Supp. 705 (E.D. Tex. 1998); *Good* v. *Armstrong*, 914 F. Supp. 1125, 1127-28 (E.D. Pa. 1996); *Jones* v. *Three Rivers Elec. Coop.*, 166 F.R.D. 413 (E.D. Mo. 1996); *Crocker* v. *Borden, Inc.*, 852 F. Supp. 1322, 1325 (E.D. La. 1994); *Guillory* v. *Ree's Contract Serv., Inc.*, 872 F. Supp. 344 (S.D. Miss. 1994); *Akin* v. *Big Three Indus., Inc.*, 851 F. Supp. 819 (E.D. Tex. 1994); *Pack* v. *AC&S, Inc.*, 838 F. Supp. 1099, 1102-1103 (D. Md. 1993); *Bahrs* v. *Hughes Aircraft Co.*, 795 F. Supp. 140 (D. Ariz. 1992); *Group Health, Inc.* v. *Blue Cross Assoc.*, 587 F. Supp. 887, 890 (S.D.N.Y. 1984).

[5] Public Citizen identifies a single district court case, *Krangel* v. *Crown*, 791 F. Supp. 1436 (S.D. Cal. 1992), as support for its assertion that corporations may not remove under § 1442(a)(1). *Krangel* is an outlier that has been expressly rejected by a host of other courts — including other district courts within the Ninth Circuit. See *Virden* v. *Altria Group, Inc.*, 304 F. Supp. 2d 832, 844 (N.D. W.Va. 2004) ("The majority of courts construing the removal statute, however, have disagreed with the holding in the *Krangel* case and have applied the federal officer removal statute to corporations."); *Arness* v. *Boeing N. Am., Inc.*, 997 F. Supp. (cont'd)

2. The Text and Relevant Statutory Policy Clearly Call for Construing "Person" to Include Corporations.

The nearly unanimous consensus that corporations are eligible to seek removal under § 1442(a)(1) is compelled by both the statutory text and the congressional policy. 1 U.S.C. § 1 provides that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise *** the word[] 'person' *** include[s] corporations *** as well as individuals." See also *Jund* v. *Town of Hempstead*, 941 F.2d 1271, 1284 (2d Cir. 1991); *Church of Scientology* v. *United States Dept. of Justice*, 612 F.2d 417, 425 (9th Cir. 1979). The proponent of a contrary interpretation must overcome the strong presumption that Congress itself has established. There is not even a colorable basis for claiming that the context of § 1442(a) "indicates otherwise."

In fact, precisely the opposite is the case. As Judge Weinstein recognized, "[p]rotection of federal government operations in today's organizational climate where so much of our economy and government outsourcing depends upon corporations" requires that they receive the same removal rights as individuals. *Isaacson*, 304 F. Supp. 2d at 447. See also *Ryan*, 781 F. Supp. at 946; *Ruffin* v.

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1268, 1272 (C.D. Cal. 1998); WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3727 n. 30.

Armco Steel Corp., 959 F. Supp. 770, 773 (S.D. Tex. 1997). These policy concerns are nowhere more salient than in the context of military contracting. See *Winters*, 149 F.3d at 398.[6] The government's own planned production of Agent Orange at the proposed Weldon Spring facility (see Stanwix-Hay Tr.[7] 39-48 (A1989-98)) would have been protected by sovereign immunity, and a suit brought directly against a government officer in connection with such production would have been removable under § 1442(a)(1). The government's election to rely instead on corporate contractors does not diminish the policy concerns that animate the removal statute: suits against contractors and federal employees "implicate[] the same interest in getting the Government's work done." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 505 (1988).

In addition, as this Court has recognized, corporations are entitled as a matter of federal common law to official immunity under the same conditions that apply to natural persons. *Pani*, 152 F.3d at 72, 74. And "one of the most important reasons for removal is to have the validity of the defense of official

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[6] See also Comment, *The Government Contract Defense After* Boyle v. United Technologies Corporation, 41 BAYLOR L. REV. 291, 310 (1989) (noting that after the Agent Orange settlement Eli Lilly and Dow refused to sell herbicides to spray coca plants in Colombia and Peru "unless indemnified by the government against the huge product liability risks") (citing contemporary news sources).

[7] Unless otherwise noted, citations to deposition transcripts appear in the Appendix to the 10/27/2004 Affidavit of William A. Krohley.

immunity tried in a federal court." *Willingham*, 395 U.S. at 406-407. This policy would be wholly undermined in a substantial body of significant cases if amicus were correct and corporations asserting official immunity were nonetheless barred per se from removing their cases to federal court.

3. *International Primate* Is Inapposite.

Despite the straightforward reasoning supporting this overwhelming weight of authority on the point, Public Citizen claims (Br. 8-11) to find support in *International Primate Protection League* v. *Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991). The prior version of § 1442(a)(1) at issue in that case permitted removal by "[a]ny officer of the United States or any agency thereof, or person acting under him." The question in *International Primate* was whether "any agency" was an object of "officer of" or constituted a freestanding grant of removal authority to the agency itself. The Supreme Court adopted the former interpretation. 500 U.S. at 87. In 1996, in reaction to *International Primate*, Congress amended the statute so that it extended the right of removal to "[t]he 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" (see Pub. L. No. 104-317, 110 Stat. 3847); it thereby gave agencies an express right to remove. Looking to this history, Public Citizen asserts that it would be "incongruous, to say the least," if corporations were covered by the pre-amendment version of § 1442, while

federal agencies were not. Br. 10. It further argues that the contrast between the 1996 amendment's specificity as to agencies and its silence as to corporations implies an intent to exclude the latter. *Ibid*.

These arguments, clever though they may be, rest on a misreading of *International Primate* and disregard the controlling statutory text. Nothing in *International Primate* suggests that removal is inherently more important for agencies than for corporations. To the contrary, the Court in *International Primate* began with the proposition that, precisely ***because*** federal agencies are so closely tied to the government, the "determination of an agency's immunity *** was sufficiently straightforward that a state court, even if hostile to the federal interest, would be unlikely to disregard the law. Thus, agencies would not need the protection of federal removal." 500 U.S. at 85. The same cannot, of course, be said of a corporation that acts at the federal government's direction but is not itself a component of the government.[8]

[8] The Court also pointed out that the reading urged by the defendant agency would have required that "him" (in "acting under him") have as its antecedent "officer *** or agency," and that the phrase "that limits exercise of the removal power to suits in which the federal defendant is charged for 'any act under color of such office' reads very awkwardly if the prior clauses refer not only to persons but to agencies." 500 U.S. at 80. And it noted the "presumption against designating the sovereign with the word 'person.'" See *Int'l Primate*, 500 U.S. at 84. All of these problems are unique to agency removal and have no application to (cont'd)

Public Citizen's related contention (Br. 7-8) that "person acting under" is intended to cover only natural persons who do not qualify as "officers of the United States" is similarly strained. Given the interpretive presumption of 1 U.S.C. § 1, Congress certainly understood that courts would not assume such a non-standard use of "person"; it could easily have replaced that term with "natural person" or "individual" had it wanted to limit the statute in such a fashion.[9]

C. The Defendants "Acted Under" Federal Officers.

1. Defendants Demonstrated the Requisite Causal Nexus Between Federal Authority and the Alleged Tortious Acts.

a. The second element of § 1442(a)(1) requires a showing that the defendant was "acting under" a federal officer when it engaged in the conduct giving rise to the litigation. *Ryan*, 781 F. Supp. at 945. Like the statute as a whole, this second prong is interpreted broadly. See *Gurda Farms* v. *Monroe County Legal*

(… cont'd)

corporations. See WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3727.

[9] Amicus cites *Mignogna* v. *Sair Aviation, Inc.*, 937 F.2d 37 (2d Cir. 1991), as a purported example of denial of removal to "an impersonal entity." Pub. Cit. Br. 8-9. But *Mignogna* did not involve a private corporation; the defendant was, instead, a "nonappropriated fund instrumentality" of the federal government. This Court assumed that the defendant "could validly effect removal under section 1442(a)(1) only if that section authorizes removal by an 'agency' of the United States," and did not consider whether the fund instrumentality could be a "person acting under [an] officer." 937 F.2d at 41. As the defendants in this case do not claim to be federal agencies, *Mignogna* is not relevant.

Assistance Corp., 358 F. Supp. 841, 843 (S.D.N.Y. 1973) (§ 1442 "has been construed broadly, and its 'persons acting under' provision particularly so"). This causation requirement is satisfied by a "threshold showing," and the court must "credit the [defendants'] theory of the case" for these purposes. See *Jefferson County*, 527 U.S. at 432. The requirement plainly is satisfied by the facts that Judge Weinstein found.

In his decision below, Judge Weinstein construed this element of the statute to require a "substantial degree of direct and detailed federal control over the defendant's work." *Isaacson*, 304 F. Supp. 2d at 447. The great weight of judicial authority sets a lower bar on the "acting under" requirement. See, *e.g.*, *Winters*, 149 F.3d at 398 ("***causal nexus*** between the federal officer's directions and the plaintiff's claims" is sufficient); *Camacho* v. *Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989) (it is sufficient if the defendant "act[ed] ***under the direction*** of federal officers"); *Noble* v. *Employers Ins. of Wausau*, 555 F.2d 1257, 1258-59 (5th Cir. 1977) ("***subject to the authority*** of the administrator"); *Ward* v. *Congress Constr. Co*., 99 F. 598, 599 (7th Cir. 1900) (construction contractor found to be "acting by the employment and under the authority of the treasury department"); *McAboy* v. *IMO Indus., Inc.*, 2005 U.S. Dist. LEXIS 29387, at *11 (W.D. Wash. Oct. 27, 2005) ("acting ***pursuant to the direction*** of a federal officer"); *Ryan*, 781 F. Supp. at 946 ("engaged in activities

that amount to the implementation of a federal policy ***under the direction*** of a government officer"); *Gurda Farms*, 358 F. Supp. at 844 (case-by-case determination of "to what extent defendants acted ***under federal direction*** and to what extent as independent agents"); *Pack*, 838 F. Supp. at 1103 ("***strong government intervention*** and the possibility that a defendant will be sued in state court as a result of the federal control") (all emphases added).

There can be no serious argument that, under the standards applied by most courts, defendants satisfy the "acting under" requirement. But even applying the stringent "substantial degree of direct and detailed federal control" standard, Judge Weinstein correctly found that removal was appropriate:

> The government designed, controlled, and supervised the production of Agent Orange as a product vital to the prosecution of the war in Vietnam. Formal military specifications and requirements were prepared and promulgated by the government. ***
>
> *** The government also strictly and precisely defined the markings that were to be placed on drums of Agent Orange supplied by defendants, prohibiting the placement of warnings.
>
> The government was aware of the dioxin in Agent Orange. It knew more about its dangers than defendants. ***
>
> As the Court of Appeals for the Fifth Circuit concluded in *Winters* and *Miller*, the Agent Orange supplied to the government was not a ready-to-order, preexisting or off-the-shelf chemical mixture. ***
>
> ***

> The government's full knowledge of the dioxin "problem" inherent in Agent Orange is evidence that the federal officials maintained control over the acts on which litigation is based.

Isaacson, 304 F. Supp. 2d at 449-50.

b. Judge Weinstein's conclusion is abundantly supported by the voluminous record amassed in this and prior Agent Orange litigation; it certainly cannot be described as clearly erroneous. That record is discussed in greater detail above and in the GCD Brief, but three salient points are most relevant here. First, the precise government specifications for Agent Orange and related chemicals, the government's decision to use those chemicals in high concentrations, and the government's detailed control over product packaging and labeling all mandate the conclusion that the contractors "acted under" government officers while producing herbicides for military use. See *Hercules Inc.* v. *United States*, 516 U.S. 417, 419 (1996) ("[t]he military prescribed the formula and detailed specifications for manufacture"); *Miller*, 275 F.3d at 418 (because "[t]he government specifically asked the defendants to produce Agent Orange using 2,4,5-T[,] *** the defendants were acting under color of federal authority when they used 2, 4, 5-T to make Agent Orange").

Second, the government commandeered entire segments of the chemical industry to ensure an adequate supply of herbicide. The defendants were unable to supply 2,4,5-T to their commercial customers because the military took control of

their entire 2,4,5-T production. See 1/22/2004 Defs.' Supp. Reply Br. in Opp. to Remand, Ex. 4 (A1326). Moreover, the government directed Hooker Chemical Co. to supply tetrachlorobenzene ("TCB"), an essential precursor ingredient, only to military contractors. Almost all of the manufacturers were wholly dependent on the TCB supplies that the government directed to them; had they not accepted military contracts, those defendants would not have been able to produce any 2,4,5-T-based herbicide at all. Indeed, defendants would have had to shut down their plants. See Lewis Tr. 78 (A1415).

Third, the record shows extensive day-to-day direction of and control over Agent Orange production and distribution by Commerce and Defense Department officers. For example:

- The government assigned federal officers — including an Administrative Contracting Officer, an Industrial Specialist, a Quality Assurance Representative, a Preservation-Packing Specialist, a Transportation Officer, and a Labor Relations Specialist — to oversee the execution and fulfillment of each Agent Orange contract. See 1/22/2004 Gordon Aff., Ex. 29 (A1402).

- The Executive Secretary of the Business and Defense Services Administration ("BDSA") ordered each Agent Orange manufacturer "to provide BDSA with a monthly report of [its] production, total shipments, shipments against rated orders, and end of month inventory of 2,4,5-T and 2,4-D" and instructed them to "let us know immediately" if it "encounter[ed] any difficulty in obtaining any raw materials." See *e.g.*, 10/27/2004 Krohley Affidavit, Ex. 65 (A2571) (order to Dow).

- Jane Lewis of BDSA repeatedly ordered contractors to accelerate their herbicide production. See Lewis Tr. 106-10 (A1809e-09i); 10/27/2004 Krohley Aff., Ex. 65 (A2571).

- Jane Lewis coordinated the supply of TCB. See 10/22/2004 Gordon Aff., Ex. 6 (A1430); 1/22/2004 Supp. Brief, Ex. 3 at point 2 (A1324).

This comprehensive and close government control, employing a unique government power to commandeer private industry, far exceeds the direction that other courts have found sufficient to justify removal. See *Akin*, 851 F. Supp. at 823-24 (compliance with procurement specifications); *Crocker*, 852 F. Supp. at 1325-26 (government provided "contract documents, design and construction drawings, written specifications, and personal oversight"); *Reed*, 995 F. Supp. at 712 (wartime government ownership of factory leased by defendant); *Pack*, 838 F. Supp. at 1103 (government provided product specifications and performance monitoring); *Fung* v. *Abex Corp.*, 816 F. Supp. 569, 572-73 (N.D. Cal. 1992) (government provided construction and repair specifications, monitored performance, and tested product).

c. There is nothing novel in the conclusion that government contractors "act under" a federal officer when they manufacture a product to government specifications and under government control.[10] To the contrary: "The paradigm

[10] It is worth noting that all Public Citizen can find to support its contrary view is dictum in a district court footnote "question[ing] whether the government contractor 'defense'" suffices for § 1442(a)(1) removal. See Pub. Cit. Br. 14 (citing *Freiberg* v. *Swinerton & Walberg Prop. Servs., Inc.*, 245 F. Supp. 2d 1144, 1151 n.5 (D. Colo. 2002)).

cases in which private actors have succeeded in removing cases under the statute have involved government contractors with limited discretion." *Virden*, 304 F. Supp. 2d at 845. In *Akin*, for example, the court held that any personal injury case arising out of a military procurement contract could be removed. It noted that "[m]any courts have concluded that removal is proper when the lawsuit arises out of actions taken by a government contractor at the direction of a federal officer." 851 F. Supp. at 823-24 ("[p]lainly, when a government contractor builds a product pursuant to Air Force specifications and is later sued because compliance with those specifications allegedly causes personal injuries, the nexus requirement is satisfied"); see also *Crocker*, 852 F. Supp. at 1325, 1327 (upholding removal where "supervision and control was exercised by contract documents, design and construction drawings, written specifications, and personal oversight of Westinghouse work by naval officers and by civilian employees of the United States Navy"); *Pack*, 838 F. Supp. at 1103; *Fung*, 816 F. Supp. at 572-73.

It is therefore unsurprising that, with the single exception of Judge Weinstein's earlier decision in *Ryan*, all other courts that have considered the issue have found that the production of Agent Orange took place under sufficient federal control to satisfy § 1442. See *Winters*, 149 F.3d at 398-99 (sufficient "that the government maintained strict control over the development and subsequent production of Agent Orange"); *id.* at 399-400 ("[w]e are convinced that the

government's detailed specifications concerning the make-up, packaging, and delivery of Agent Orange, the compulsion to provide the product to the government's specifications, and the on-going supervision the government exercised over the formulation, packaging, and delivery of Agent Orange is all quite sufficient to demonstrate that the defendants acted pursuant to federal direction and that a direct causal nexus exists between the defendants' actions taken under color of federal office and Winters's claims"); *Miller*, 275 F.3d at 418 ("we find that the defendants produced Agent Orange at the behest of the federal government"). There is no reason to depart from those holdings now.[11]

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[11] Plaintiff Isaacson's assertion (Br. 21) that Judge Weinstein's decision "completely reversed in all respects [his] own prior *Ryan* opinion" seriously mischaracterizes *Ryan*. That opinion held that the defendants were "persons" under 28 U.S.C. § 1442(a)(1) (781 F. Supp. at 946-47); that they had offered a colorable federal law defense (*id.* at 945); and that they "were under the ***direct and detailed control*** of various government officers including the Executive Secretary of the BDSA" (*id.* at 950 (emphasis added)). See also *ibid.* ("[t]he defendants were, in this respect, compelled under threat of criminal sanction to deliver Agent Orange produced according to government specifications to the Defense Department"). The court granted remand solely because "[a]lthough the defendants later ***produced and delivered*** Agent Orange under the control of federal officers, these subsequent acts are distinct from the earlier acts of product and manufacturing ***design*** being sued upon" in the earlier case. *Ibid.* (emphasis added). Plaintiffs now rely entirely on imagined defects in a manufacturing process that *Ryan* held was carried out "under the control of federal officers." Judge Weinstein was so concerned in *Ryan* with the "closeness of the case" that he employed a novel tactic to certify the decision for review. See *id.* at 952-53. This Court, however, concluded that it lacked jurisdiction to hear the appeal. See No. 92-8008 (2d Cir., May 8, 1992). Now that Judge Weinstein has reconsidered and found that (cont'd)

2. Plaintiffs' Contention That Defendants Have Not Shown "Compulsion" Is Both Legally Irrelevant and Factually Erroneous.

Plaintiffs seek to confuse the "acting under" issue by asserting that defendants were not "compelled" to produce Agent Orange. This argument is not only a conceptual red herring, but is also factually unfounded.

As a legal matter, government compulsion is not a prerequisite for removal. Section 1442(a)(1) requires only that the government set the course of conduct by exercising "direction" over the defendant's activity; there is no language suggesting a requirement that individual actors show that they could not have opted out of the relationship. Moreover, apart from the absence of a textual foundation for plaintiffs' proposed requirement, their proposed rule is wholly inconsistent with the purpose of the statute: it would deny removal to all defendants except, perhaps, prison laborers, for even most government employees are not "compelled" to perform their jobs. And because the government must act through its officers, the benefits of removal would be largely meaningless if the

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(… cont'd)

"[t]he *Ryan* decision is no longer persuasive," *Isaacson*, 304 F. Supp. 2d at 445, the federal jurisprudence on the subject of § 1442 removal of Agent Orange product liability claims uniformly favors removal.

only officers who could remove were those compelled to do the government's work.

Nor do the defendants need to show that the ***specific*** act alleged to be tortious was directed, let alone compelled, by the government. The requirement of a causal connection is satisfied as long as the suit arises from actions undertaken as a result of the relationship between the government and the defendant. See *Maryland* v. *Soper*, 270 U.S. 9, 33 (1926) ("[T]he statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority. It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution."). See also, *e.g.*, *Willingham*, 395 U.S. at 409; *Malone* v. *Longo*, 463 F. Supp. 139, 142 (S.D.N.Y. 1979); *Johnson* v. *Busby*, 520 F. Supp. 751 (D. S.D. 1981). Here, it is undisputed that the defendants produced Agent Orange at the government's direction and that the plaintiffs came into contact with that product only by virtue of the defendants' relationship with the U.S. government. Accordingly, the second prong of the § 1442(a)(1) test is satisfied.

In any case, the defendants ***were*** subject to a unique and unprecedented level of government coercion. See GCD Br. 51-55. The full extent of government control over the production of Agent Orange is discussed in the accompanying

brief, but it is worth emphasizing here that, notwithstanding plaintiffs' comments on the formality of the contractual language (Isaacson Br. 47-48), the defendants' relationship with the government was anything but arm's length. As the court explained in *Maxus Energy Corp.* v. *United States*, 898 F. Supp. 399 (N.D. Tex. 1995), aff'd, 95 F.2d 1148 (5th Cir. 1996) (cited at Isaacson Br. 40), "[t]he relationship between the United States and Diamond under the D[efense] P[roduction] A[ct] 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***." *Id.* at 408 (emphasis added).

Even the plaintiffs' own experts remarked on the contrast between the façade of voluntary agreement and the reality of government compulsion. See PA6993-94 (Nash Affidavit) (describing "the technique used by Government officials to induce contractors to freely negotiate contracts for their full capacity of Agent Orange by discussing the possibility of receiving ***mandatory*** orders under the Defense Production Act"). The testimony of Gerald Stephenson, the Commerce Department attorney responsible for advising the BDSA concerning the Defense Production Act, also supports the conclusion that the defendants had no practical choice but to comply. If a contractor rejected a rated order, Stephenson explained, "it would become a matter of persuasion, if you will, or enforcement, to bring him into compliance, *** [o]r a legal force, he could be compelled."

2/4/2005 Gordon Aff., Ex. 1 (Stephenson Tr.) at 40, 43 (A2574e-74f. See also *id.* at 44 (A2574g) ("you could go to court and compel them to take it"); *id.* at 49 (A2574h) (noting availability of legal penalties).

The contractors themselves likewise treated the federal orders as mandatory. See 2/4/2005 Gordon Aff., Ex. 4 at 152 (A2576) (James O. King, Diamond's Sales Manager for Agricultural Chemicals testifying that he "never understood" that a contractor could refuse to accept a D.O. rated contract). As the Fifth Circuit held, construing case law developed under predecessors to the DPA,

> when a manufacturer is given to understand that he is required to supply certain goods to the government of the United States, and is told that he has no option to decline to comply, we are satisfied that as to those goods an 'order' has been placed or received, *** notwithstanding the fact that the parties actually come to an agreement in what has the form of a contract. Substance is not to be sacrificed in such cases to form.

Eastern Air Lines, 532 F.2d at 994 (citing *Roxford Knitting Co.* v. *Moore & Tierney, Inc.*, 265 F. 177, 191 (2d Cir. 1920)). The fact that contractors "freely bid" for contracts only with the specter of mandatory orders looming over them belies the claim that the defendants acted as independent agents. In truth, they were functional subordinates of Commerce and Defense Department officials.

3. The Decisions Cited by Plaintiffs Are Inapposite.

The district court decisions plaintiffs cite in contending that defendants were not "acting under" federal officials are inapposite. The defendants in *Bakalis* and

Virden, for example, sought removal based solely on the fact that they were ***regulated*** by the federal government. See *Bakalis* v. *Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) ("[Defendant] is simply a corporation regulated by the government."); *Virden*, 304 F. Supp. 2d 832 ("[Government]'s acceptance of a voluntary agreement formed in 1970 by the tobacco industry may suggest its implied regulation of the defendants" but is insufficient for § 1442 removal.).[12]

Similarly, the defendants in *Wigand* and *Kaplansky* grounded their removal arguments on the fact that their allegedly tortious statements occurred in the course of federal ***investigations***. See *Brown & Williamson Tobacco Corp.* v. *Wigand*, 913 F. Supp. 530, 532-33 (W.D. Ky. 1996) ("Wigand's testimony in three separate civil suits, Wigand's disclosure of confidential documents to national newspapers, and Wigand's disclosure of information in an interview with '60 Minutes' *** are not activities 'performed pursuant to federal direction,'" especially since "[t]his suit was filed before" the alleged federal control began.); *Kaplansky* v. *Assoc. YM-YWHAs*, No. 88-1292, 1989 WL 29938, at *3 (E.D.N.Y. Mar. 27, 1989) (rejecting defendants' argument that "compliance with the requests of the U.S. Attorney's Office and the federal grand jury subpoena [constituted action] under color of the

[12] More recent authority, on the same facts as *Virden*, ***has*** permitted removal based on an agreement entered into to stave off an enforcement order. See *Watson* v. *Philip Morris Cos., Inc.*, 420 F.3d 852, 858-61 (8th Cir. 2005).

*** U.S. Attorney's Office."). Thus, none of those cases involved the sort of close, ongoing, and coercive relationship that existed between the government and the defendants in this case.

Other decisions cited in plaintiffs' brief gave so little consideration to the removal issues that they provide no guidance here. *Barbara* v. *N.Y. Stock Exch., Inc.*, 99 F.3d 49 (2d Cir. 1996), rejected the defendant's removal notice *sua sponte* in one sentence, apparently without briefing. *Id.* at 55; see also 1995 WL 17214419 (defendant's brief in *Barbara*) (omitting any discussion of removal). It is unclear from the opinion what, if any, grounds for removal the Exchange could plausibly have asserted. *Mizuna, Ltd.* v. *Crossland Fed. Savings Bank*, 90 F.3d 650 (2d Cir. 1996), devoted two sentences to removal, noting that federally chartered banks are not automatically treated as federal officers and that the defendant's failure even to allege a federal defense deprived the court of Article III jurisdiction. *Id.* at 655. The defendant in *Williams* v. *General Electric Co.*, 2005 WL 2035352 (M.D. Pa., Aug. 22, 2005), simply failed to argue the point. See *id.* at *4 ("GE has failed to provide any support for its claim that it was acting 'under' a federal officer[:] *** the affidavit offered in support of GE's removal nowhere contains an allegation that GE was acting under such an officer."). The plaintiffs' inability to identify a single case denying a seriously presented removal petition by a government contractor speaks volumes about the weakness of their position.

Finding no support in decisions that actually address removal under § 1442, the plaintiffs next reach out to the law of CERCLA third-party liability. See Isaacson Br. 36-41. In litigation unrelated to the product liability claims at issue here, the federal government and the State of Arkansas sued Hercules under CERCLA, seeking reimbursement for environmental cleanup costs associated with the disposal of industrial wastes generated by Agent Orange production. The district court and the Eighth Circuit rejected the defense that the government should itself be liable because the companies had generated the waste in performing a federal contract. *United States* v. *Vertac Chem. Corp.*, 841 F. Supp. 884 (E.D. Ark. 1993), aff'd, 46 F.3d 803 (8th Cir. 1995).

CERCLA is an environmental statute, concerned with waste disposal, not with design and manufacturing decisions like those at issue in this case. CERCLA establishes liability for several types of third-parties, including those who "own[] and operat[e]" the facility at which the hazardous waste was produced. 42 U.S.C. § 9607(a)(2). Case law interprets subsection (a)(2) to cover anyone who "(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."[13] *Vertac*, 841 F. Supp. at 888-89; see also *Maxus Energy Corp.*, 898 F. Supp. 399 (granting summary judgment against company that had agreed to implement remedial measures in action by that company to obtain contribution from the government for EPA-ordered cleanup costs at site where Diamond had manufactured Agent Orange).

According to appellant Isaacson,[14] if the government was not liable under CERCLA, then its control over the production process was insufficient to allow defendants to satisfy the "acting under" prong of the removal statute.[15] But the

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[13] Liability may also arise under subsection 9607(a)(3) for one who owns the waste itself and "arrange[] for [its] disposal[,] treatment" or transportation. That subsection requires that the defendant "either (1) *** had the actual authority over the disposal of hazardous substances ***, or (2) *** supplied the raw materials, and owned or controlled the work in process, and *** the generation of hazardous substances was inherent in the production process." *Vertac*, 841 F. Supp. at 888-89.

[14] Public Citizen refrains from making this argument.

[15] Isaacson also repeats the allegation that the defendants lobbied against the Weldon Spring project in order to secure contracts for themselves. Br. 39. It is undisputed, however, that it was not until October 29, 1968 — more than a month after the September 18, 1968 BDSA directive relieving manufacturers of the requirement to produce Agent Orange at the prescribed rates — that certain manufacturers expressed concern about the Weldon Spring project. See 2/4/2005 Gordon Aff., Ex. 13 (A2582a-82k). That action was motivated not by a desire to preserve their own contracts but by a fear of oversupply after manufacturers had substantially increased their capacity since 1967, while military requirements were falling off. *Ibid.*

CERCLA liability and federal officer removal issues arise in entirely different contexts and serve entirely different policies. Moreover, the language of the relevant CERCLA provisions is wholly different from that of § 1442. The latter is not about whether the government, or indeed anyone else, should be substantively liable for damages or costs; it is about whether a federal forum should be provided to protect the government and those who act under its direction from the dangers of a biased state court. It stands to reason that the bar should be lower for removal than for liability.

Furthermore, the CERCLA claims and the claims in this case relate to entirely different steps in the process. The *Vertac* court found that the government did not have the power to "take over the plant," a necessary condition for the CERCLA claims, even though it did have the power to specify the formulation of Agent Orange and compel the defendants to produce the herbicide according to its allegedly defective specifications. See *Vertac*, 841 F. Supp. at 890 ("Section 101 of the DPA gives the President authority ***to require companies to accept and perform *** contracts and orders*** ***, and to require that companies give priority to the performance of such contracts ***. The DPA does not give the United States the authority to ***take over the plant***, or to ***control the contractor's operations and activities***.") (emphasis added)). Plaintiffs cite no authority for the proposition that "acting under" requires that the government control every aspect

of the defendant's actions; in a defect case, it should be sufficient that the government compelled the defendant to produce the allegedly defective product. Indeed, considerably less than that — that the manufacturer was acting under government direction — is enough to sustain removal.

D. This Suit Challenges Actions That Were Taken Under Color of Federal Authority.

The third and final requirement of § 1442 is that the suit have arisen from an "act under color of *** office." The purpose of this prong is to ensure Article III jurisdiction: by requiring that the challenged acts related to the defendant's federal responsibilities, the color of office prong ensures the presence of a federal defense.

As the Supreme Court held in *Mesa* v. *California*, 489 U.S. 121 (1989), where the defendants are not themselves federal officers; but were "acting under" a federal agency (*id.* at 125) — as the present defendants were — "color of office" "impose[s] a requirement that some federal defense be alleged by the federal officer seeking removal. *** Congress meant by ['under color of office'] to preserve the pre-existing requirement of a federal defense for removal." *Id.* at 125, 135.[16] See also *Kolibash* v. *Comm. on Legal Ethics*, 872 F.2d 571, 574 (4th Cir.

[16] In *Jefferson County*, a case brought under § 1442(a)(3), which allows removal by officers of federal courts, the Court required that the officers "both raise a colorable federal defense, and establish that the suit is for a[n] act under color of office. To satisfy the latter requirement, the officer must show a nexus, a (cont'd)

1989) ("A federal officer's right of removal under § 1442(a)(1) is therefore available whenever a suit in a state court is for any act 'under color' of federal office — i.e., ***whenever a federal defense can be alleged by the federal officer seeking removal***.") (emphasis added).[17]

Like the other elements of § 1442(a)(1), this requirement is liberally construed in favor of removal. See *Winters*, 149 F.3d at 398 ("We have previously noted the Supreme Court's admonishment that the statute's 'color of federal office' requirement is neither 'limited' nor 'narrow,' but should be afforded a broad reading so as not to frustrate the statute's underlying rationale."); *Malone*, 463 F. Supp. at 142; *Areskog* v. *United States*, 396 F. Supp. 834, 838 (D. Conn. 1975)

(… cont'd)

'causal connection between the charged conduct and asserted official authority.'" 527 U.S. at 431 (internal quotation marks and citations omitted). By contrast, "[i]n cases like this where the defendant claims to have been a 'person acting under' an officer, analysis of the two parts of the causation element tends to converge to a single inquiry: whether the defendants are being sued based upon actions taken pursuant to federal direction." *Ryan*, 781 F. Supp. at 945 (internal quotation marks and citation omitted). Thus, whether the causal nexus requirement is properly understood as tied to "acting under" or "color of office," the same ultimate standard applies, and defendants have satisfied that standard.

[17] It is the general rule, of course, "that an action may be removed from state court to federal court only if a federal district court would have original jurisdiction over the claim in suit. *** Suits against federal officers are exceptional in this regard. Under the federal-officer removal statute, suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law." *Acker*, 527 U.S. at 430-31.

("In construing the 'color of office' requirement for removal under § 1442(a)(1), the *Willingham* court emphasized that the phrase must be broadly construed ***.").

The defendant need not prove the federal defense in order to remove; it suffices to present a "colorable" claim that the defense applies. The Supreme Court has rejected "the anomalous result of allowing removal only when the officers had a clearly sustainable defense. *** The officer need not win his case before he can have it removed." *Willingham*, 395 U.S. at 407. Thus, it is enough that the federal defense is not "completely frivolous" (*Williams* v. *Brantley*, 492 F. Supp. 925, 928 (W.D.N.Y. 1980), aff'd, 738 F.2d 419 (2d Cir. 1984)); the removing defendant need not offer "an airtight case on the merits." *Jefferson County*, 527 U.S. at 432. See also *Winters*, 149 F.3d at 400 ("It is important to note that the defendants need not prove the asserted defense, but need only articulate its 'colorable' applicability to the plaintiff's claims."); *Torres* v. *CBS News*, 854 F. Supp. 245, 247 (S.D.N.Y. 1994) (granting removal despite finding that bulk of authority was contrary to defendant's federal defense). And courts must "credit the [defendant's] theory of the case" when determining whether the defendants have raised a colorable federal defense; indeed, in *Jefferson County* the Court upheld removal but rejected the defense. See 527 U.S. at 435-36.

Here, it is plain that defendants have demonstrated far more than a "colorable" claim to the government contractor defense. Every federal judge to

consider the issue — including a panel of this Court — has found that the defendants are entitled to the protection of that defense. Accordingly, the third prong of the removal statute is satisfied.

1. The Government Contractor Defense Satisfies the "Under Color of Office" Requirement.

Plaintiffs' protestations to the contrary notwithstanding, it is established beyond question that the government contractor defense satisfies the requirement of a federal defense under § 1442(a)(1).[18] See WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3727 (1998); RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 909 (5th ed. 1998); *Winters*, 149 F.3d at 401; *Miller*, 275 F.3d at 418 ("As in the present action, the colorable federal defense asserted by the defendants in *Winters* was the military contractor defense."); *Guillory*, 872 F. Supp. at 346; *Crocker*, 852 F. Supp. at 1327; *Akin*, 851 F. Supp. at 823; *Pack*, 838 F. Supp. at 1103; *Fung*, 816 F. Supp. at 573. *Boyle* itself describes the defense as a matter of federal common law. 487 U.S. at 504. Indeed, the defendants in this case present

[18] The metaphysical distinction plaintiffs attempt to draw between "defenses" and "standards of liability" (Isaacson Br. 25-26) is nonsensical. If federal law provides a specific "standard of liability" for military contractors and then protects contractors meeting that standard against state claims, it necessarily provides a federal "defense" to those claims. In any event, neither the text nor the rationale of § 1442(a)(1) requires a federal "defense" in some narrow, technical sense; the statute requires only a federal question.

a stronger case for removal than does the typical government contractor: they did not simply produce a product pursuant to military specifications but rather operated under the ***direct supervision and compulsion of officials of the Business and Defense Services Administration*** (a situation that is unlikely to recur, because the Defense Production Act has been permitted to lapse).

It therefore is no surprise that other courts hearing product liability claims against Agent Orange contractors have found the potential availability of the government contractor defense to support removal. See *Miller*, 275 F.3d at 418 ("[a]s in the present action, the colorable federal defense asserted by the defendants in *Winters* was the military contractor defense"); *Winters*, 149 F.3d at 401 ("[w]ithout deciding the merits of the government contractor defense in this case, we certainly deem its assertion sufficiently colorable for § 1442 removal purposes"). And given that defendants have repeatedly won summary judgment on the basis of the government contractor defense, Isaacson's arguments on the merits of the defense (Br. 31-45) cannot support the claim that defendants have not made even a "threshold showing." See *Isaacson*, 304 F. Supp. 2d 404; Miller, 275 F.3d at 423; *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263, 1274 (E.D.N.Y. 1983) (granting summary judgment as to the first two prongs of the defense for all defendants and complete summary judgment as to several defendants); *cf. Hercules*, 24 F.3d at 198 ("Hercules and Thompson cannot prove

that their damages [*i.e.*, payments to the Agent Orange settlement fund] were caused by the government[] *** because they were protected from liability to the Agent Orange plaintiffs by the government contractor defense.").

2. The Court Should Reject Plaintiffs' Attempts to Graft Additional Requirements Onto the Statute.

Unable effectively to contest that the settled requirements for removal under § 1442(a)(1) have been satisfied, plaintiffs and their amicus attempt to read novel and insupportable elements into the statute. There is no warrant for these efforts.

a. "Color of Law" Cases Have No Bearing on Officer Removal.

First, amicus attempts to draw elaborate inferences from dictum in *Screws* v. *United States*, 325 U.S. 91 (1945), a federal criminal prosecution for violation of the victim's constitutional rights. See Pub. Cit. Br. 15-16.[19] The statute at issue in *Screws* required a finding that the defendant had acted "under color of any law." In finding that requirement satisfied, the Court rejected the defendant's reliance upon two decisions that had denied removal under the old federal officer removal statute, 28 U.S.C. § 76, finding that "those cases do not supply an authoritative guide to the problems under § 20" (325 U.S. at 111-12) and implying that the "color of office" standard applied in those cases was narrower than the "color of

[19] Again, plaintiffs themselves do not propound this argument.

law" standard at issue in *Screws*. There is today a new and different removal statute, the interpretation of which is not meaningfully illuminated by *Screws.* To the extent that case may be thought to support a narrow construction of "color of office," it is superseded by, *inter alia*, *Willingham* and *Jefferson County*. Indeed, in the 60 years since it was decided, *Screws* has never been interpreted as restricting removal under § 1442 — indeed, it has never even been cited for that proposition. In fact, the Supreme Court itself recently reiterated that "[w]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Cmty. Coll.* v. *Katz*, 126 S. Ct. 990, 996 (2006). Accordingly, the Court's dictum regarding the "color of office" standard has no force here.

b. Invocation of § 1442(a)(1) Does Not Require an Immunity Defense — Any Federal Defense Is Sufficient.

Plaintiffs get no further when they rely on the Supreme Court's decision in *Willingham* for the proposition that § 1442(a)(1) permits removal only when the defendant advances, not ***any*** "colorable federal defense," but a "federal immunity defense." Isaacson Br. 27-30. This argument is futile for several reasons, the first of which is that defendants here ***are*** asserting an immunity defense: if they meet the conditions set out in *Boyle*, they are clothed in the government's unwaived sovereign immunity. Only irrelevant terminological hairsplitting could characterize

that immunity as functionally different for these purposes from that enjoyed by, say, federal law enforcement officers validly performing their federal duties.

In any event, a claim of immunity is not a necessary prerequisite to § 1442 removal. While the Court said in *Willingham* 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" (395 U.S. at 407) the decision nowhere suggested that § 1442(a)(1) ***requires*** an immunity defense. To the contrary, the Court earlier instructed that "the test for removal should be broader, not narrower, than the test for official immunity." *Willingham*, 395 U.S. at 405.

Plaintiffs' discussion of *Mesa* v. *California* is similarly off-base. In that case, the defendant mail truck drivers attempted to remove solely on the basis of the "causal connection" between their federal employment and the traffic offenses with which they were charged. The problem was not that they could not present an official immunity defense, but rather that they could not present ***any*** federal defense at all. The court of appeals had held that officers may not invoke § 1442 "when they raise no colorable claim of federal immunity ***or other federal defense***." *California* v. *Mesa*, 813 F.2d 960, 967 (9th Cir. 1987) (emphasis added); see also *Mesa*, 489 U.S. at 125 (reciting that the state argued only for "a requirement that ***some federal defense*** be alleged" (emphasis added)). Because the defendants had raised ***no*** federal defense, the Supreme Court's concern was not with the

distinction between immunity and other defenses, but rather with ensuring the existence of Article III federal question jurisdiction. 489 U.S. at 136 ("[t]he Government's view, which would eliminate the federal defense requirement, raises serious doubt whether, in enacting § 1442(a), Congress would not have expand[ed] the jurisdiction of the federal courts beyond the bounds established by the Constitution" (internal quotation marks omitted) (alteration in original)).[20]

Indeed, even *Tennessee* v. *Davis*, 100 U.S. 257 (1879), the progenitor of officer removal jurisprudence, did not involve an immunity defense. As *Mesa* explained, the state law justification defense required that Davis prove both that he was actually defending himself and that his acts were justified. Davis did not claim that he was ***immune*** under federal law, but only that his federal duties provided the justification required for his state law defense. Nonetheless, the Court allowed Davis to remove. See *Mesa*, 489 U.S. at 127-28. Thus, plaintiffs' position finds no support either in *Mesa* itself or in the precedent that led to it.[21]

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[20] See also RICHARD H. FALLON, JR. ET AL., HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 433 (5th ed. 2003) ("Clearly in the background in *Mesa* was a concern that, if § 1442 were construed to permit removal in the absence of a federal defense, the case might not 'aris[e] under' federal law in the constitutional sense, and thus would not come within any of the authorized categories of federal jurisdiction under Article III" (alteration in original)).

[21] The related suggestion that the defendants' inability to claim sovereign tax immunity somehow bars them from removing these cases to federal court (see Pub. (cont'd)

c. Section 1442(a)(1) Also Does Not Limit Removal to Defendants That Were "Enforcing Federal Law" at the Time of the Challenged Act.

Like plaintiffs, amicus misconstrues *Willingham*, reading that decision to establish that removal is available only to defendants that were "enforcing federal law" when they engaged in the allegedly tortious activity. See Pub. Cit. Br. 11. There is, of course, no such requirement on the face of § 1442. Assuming that amicus intends "enforce" in its usual sense of "compel obedience to," its interpretation would deny removal to most federal employees making official decisions. Such an approach finds no support in the text or policy of § 1442(a)(1). After all, the point of § 1442(a)(1) is to ensure that state courts do not frustrate the

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(… cont'd)

Cit. Br. 16 n.5) is likewise baseless. Public Citizen doubtless is correct that the assertion of the government contractor defense (or, for that matter, most other federal defenses) "does not present the problem of 'clashing sovereignty' that *** federal tax immunity *** is intended to avoid." *Ibid.* (citation omitted). But "clashing sovereignty" of the sort addressed in the tax immunity decisions never has been thought a prerequisite for federal officer removal. Federal judges, for example, have no immunity against state income tax liability but nevertheless may remove a suit when they are sued in state court for actions that arise out of their federal duties. See *Jefferson County*, 527 U.S. 423. The federal officer removal statute does not preempt state law, as does the tax immunity doctrine; instead, it creates a practical "protect[ion for] federal officers from interference by hostile state courts" by providing a federal forum to protect "a 'federal interest in the matter,' *Poss* v. *Lieberman*, 299 F. 2d 358, 359 (C. A. 2d Cir.)." *Willingham*, 395 U.S. at 402, 406. That interest warrants removal in cases like the instant ones.

effectuation of federal policy, and that goal comes into play whether the defendant is compelling others to comply with federal standards or is itself performing a federal function.

If amicus instead means "enforce" in the sense of "implement," the defendants meet this standard: their actions were essential to the strategy of "deny[ing] enemy forces the benefits of jungle concealment along transportation and power lines and near friendly base areas." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187, 193 (2d Cir. 1987).

Selectively quoting *Willingham*, Public Citizen nevertheless asserts that "the purpose of the removal statute is to permit removal where 'federal officers can raise a colorable defense *arising out of their duty to enforce federal law.*'" Pub. Cit. Br. 11 (quoting 395 U.S. at 406-407) (Public Citizen's emphasis). But it omits the first part of the sentence, in which the Court stated that, "***[a]t the very least***, [§ 1442] is broad enough to cover all [such] cases." *Willingham*, 395 U.S. at 406 (emphasis added). Amicus has attempted to convert a sufficient condition into a necessary one by eliding unhelpful language.

Nor does the *Mesa* opinion "emphasize[] that the requirement of such a defense is integral to the statute." Pub. Cit. Br. 11 (citing *Mesa*, 489 U.S. at 126). The word "enforce" does not even appear on the quoted page. Instead, the *Mesa* Court observed generally that "an unbroken line of this Court's decisions

extending back nearly a century and a quarter have understood all the various incarnations of the federal officer removal statute to require the averment of ***a federal defense***." *Mesa*, 489 U.S. at 133-34 (emphasis added).

Public Citizen's position finds no more support in *Jamison* v. *Wiley*, 14 F.3d 222 (4th Cir. 1994). That case does not say, as Public Citizen misleadingly describes it, that the removing defendant "***must***" "allege a 'colorable' federal defense *** 'arising out of [his] duty to enforce federal law'" (Pub. Cit. Br. 11 (quoting *Jamison*, 14 F.3d at 238[22]) (emphasis added) (Public Citizen's alterations)); it says only that *Mesa* "guarantee[s] a federal officer the right to remove an action *** when he can allege" such a defense. *Jamison*, 14 F.3d at 238.

d. Public Citizen's Policy Arguments in Favor of a Narrow Construction of § 1442(a)(1) Ignore the Clear Language and Purpose of the Statute.

As its last gasp, Public Citizen concludes (Br. 18-22) by asking the Court simply to ignore the federal officer removal statute. But its disquisition on the competence of state courts to adjudicate federal questions is better addressed to Congress. The fact, unpalatable though it may be for plaintiffs whose claims have

[22] Although the brief cites to p. 239, the quoted language appears on p. 238.

been rejected repeatedly in federal court, is that Congress has chosen not only to grant federal officers and those acting under their direction a removal right, but to expand that right over time.[23] See *Isaacson*, 304 F. Supp. 2d at 446; *Hill Parents Assoc.* v. *Giaimo*, 287 F. Supp. 98, 99 (D. Conn. 1968) (§ 1442 "has steadily been enlarged in scope"). Courts interpreting the statute over the past two centuries, moreover, have emphasized that it should be interpreted broadly in light of its legislative purpose. Section 1442, after all, does not displace state law or extinguish substantive claims; it merely ensures that defenses proffered by those executing federal policy will be given a fair hearing in federal court. In so doing, it serves an important policy objective: like the government contractor defense itself, the removal statute enables the government to obtain what it needs, when it needs it. As Judge Weinstein stated:

> If 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

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[23] Plaintiffs' related contention — that state courts are fully capable of adjudicating the government contractor defense (Isaacson Br. 30-31 (citing state cases)) — misses the point. The case is removable not because of some functional incapacity of the state courts but because Congress believed federal courts to be the more suitable forum for the adjudication of federal defenses asserted by persons acting at the direction of federal officers. See *Manypenny*, 451 U.S. at 242; *Willingham*, 395 U.S. at 406; *Malone*, 463 F. Supp. at 141 ("Removal pursuant to this provision *** is an absolute right and is not dependent upon the discretion of the court.").

> the federal government. Since the advent of the Agent Orange litigation in 1979, mass tort law has become more hazardous for defendants. While on balance state tort law does more good than harm, its vagaries and hazards would provide a significant deterrent to necessary military procurement.

Isaacson, 304 F. Supp. 2d at 451.

Public Citizen's evident view that this Court should disregard § 1442(a)(1) because it is "anachronistic" (see Pub. Cit. Br. 19) finds no support in the law. As Justice Brennan pointed out in his *Mesa* concurrence, "[t]he days of widespread resistance by state and local governmental authorities to Acts of Congress and to decisions of this Court in the areas of school desegregation and voting rights are not so distant that we should be oblivious to the possibility of harassment of federal agents by local law enforcement authorities." 489 U.S. at 140 (Brennan, J., concurring).

Federal interests in supremacy and fairness to federal officers, moreover, are not limited to a particular historical era. See *Willingham*, 395 U.S. at 405-406 (holding that "the removal statute is an incident of federal supremacy" and concluding that "[t]he purpose of all these enactments is not hard to discern"); *Sparks*, 978 F.2d at 232 ("[T]he Supreme Court has for over two decades required a liberal interpretation of § 1442 in view of its chief purpose — to prevent federal officers who simply comply with a federal duty from being punished by a state

court for doing so."). These concerns are even more salient in the case of military contractors. As the Fifth Circuit noted with regard to Agent Orange contracting:

> The welfare of military suppliers is a federal concern that impacts the ability of the federal government to order and obtain military equipment at a reasonable cost. Federal interests are especially implicated where, as in this case, the Defense Department expressly issued detailed and direct orders to the defendants to supply a certain product. The specificity of the order raises this issue to a federal concern subject to removal under section 1442(a)(1).

Winters, 149 F.3d at 398. See also *Isaacson*, 304 F. Supp. 2d at 451 ("Because government contractor cases are freighted with factual findings, *Boyle*, while laying down a substantive rule, may be readily circumvented by state courts unsympathetic to the defendants."). As *Winters* and other courts have held, § 1442(a)(1) requires that such federal interests be protected by giving defendants the right to remove to a federal forum.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the order below granting removal of these cases to federal court pursuant to 28 U.S.C. § 1442 (a)(1).

May 10, 2006

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STATUTORY ADDENDUM

United States Code Annotated

Title 28. Judiciary and Judicial Procedure

Part IV. Jurisdiction and Venue

Chapter 89. District Courts; Removal of Cases from State Courts

§ 1442. Federal officers or agencies sued or prosecuted

(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 the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief was produced in Times New Roman (a proportionally-spaced typeface), 14-point type and contains 13,960 words (based on the Microsoft Word word processing system word count function).

I further certify that the electronic copy of this brief filed with the Court is identical in all respects except the signature to the hard copy filed with the Court, and that a virus check was performed on the electronic version using the Norton Anti-Virus software program.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re "Agent Orange" Product Liability Litigation	:	**MDL No. 381**
	:	Nos. 05-1760-CV; 05-1693-CV; 05-1694-CV; 05-1695-CV; 05-1696-CV; 05-1698-CV; 05-1700-CV; 05-1737-CV; 05-1771-CV; 05-1810-CV; 05-1813-CV; 05-1820-CV; 05-2450-CV; 05-2451-CV; 05-1817-CV
	:	

CERTIFICATE OF SERVICE

I, Andrew L. Frey, a member of the Bar of this Court, hereby certify that on Wednesday, May 10, 2006, I caused to be served upon each counsel of record for Appellants two copies of the Brief for Defendants-Appellees on Removal via first-class mail to the addresses that appear on the following service list.

I further caused the document to be served today via electronic mail on each counsel of record for Appellants who has a functioning e-mail address, as identified in the following service list.

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