

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

RICHARD D. LONG,

Case No. 3:23-cv-1325-AR

Plaintiff,

**FINDINGS AND
RECOMMENDATION**

v.

3M COMPANY, *et al.*,

Defendants.

ARMISTEAD, Magistrate Judge

Plaintiff Richard Long suffers from mesothelioma, a terminal cancer. He alleges that his disease is the result of asbestos, to which he was exposed while working with defendants' products at shipyards in Portland, Oregon. (Compl. ¶¶ 6-10, ECF No. 1-1.) Long filed this action in state court against 51 named defendants, including Foster Wheeler Energy Corporation, alleging that defendants' asbestos-containing products were unreasonably dangerous and defective, and that defendants negligently failed to take precautions to prevent asbestos-related injuries. (*Id.* ¶¶ 2, 23.)

Foster Wheeler removed the action to federal court under the federal officer removal statute, 28 U.S.C. § 1442, which permits removal of civil actions against private parties acting under federal officers. (Notice of Removal, ECF No. 1.) Long now asks the court to remand to Multnomah County Circuit Court, arguing that the federal officer removal statute does not confer subject matter jurisdiction here because Long never made claims for exposure on Navy ships and has now waived any claims to which a federal contractor defense could apply.¹ (Pl.’s Mot. at 5-6, 9-11, ECF No. 84.)

Foster Wheeler responds that Long’s attempted waiver does not deprive Foster Wheeler of its federal officer defense because that waiver is ineffective and does not eliminate all claims to which the federal officer defense could apply. (Def.’s Resp. at 8, ECF No. 92.) Even if Long’s waiver eliminates the court’s jurisdiction under the federal officer removal statute, Foster Wheeler argues that the court must retain the case under its original admiralty jurisdiction. (*Id.* at 18, 29.) Alternatively, Foster Wheeler asks the court to deny Long’s motion because he failed to confer in violation of Local Rule of Civil Procedure 7-1(a)(1). (*Id.* at 17-18.)

Because Long’s waiver makes clear that there is no causal nexus between his claims and the actions Foster Wheeler took under federal officer direction, and because the court’s admiralty jurisdiction does not justify removal, the court recommends granting Long’s Motion to Remand.

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¹ Long also asserts that this action should be remanded because Foster Wheeler’s removal was untimely. The court does not address that argument, or Foster Wheeler’s response, because it concludes that remand is proper based on lack of jurisdiction.

BACKGROUND

A. *Long's Complaint*

Long's Complaint neither distinguishes between claims made against each of the 51 named defendants nor alleges specific times or places when Long was exposed to asbestos through each defendant's product. Instead, he alleges that he was exposed to asbestos in defendants' products throughout his 30 years spent working as a shipyard foreman and laborer. (Compl. ¶¶ 6-10.) He also alleges nonoccupational asbestos exposure from 40-plus years of repairing and maintaining his personal vehicles. (*Id.* ¶ 11.) His Complaint does not mention work done on Navy or Coast Guard vessels. It states: "None of Plaintiff's claims herein against any Defendant are for exposures at any United States governmental sites or enclaves, or under the direction of any United States government employee, administration, or contractor." (*Id.* ¶ 13.)

B. *Procedural Background*

The parties deposed Long in early September 2023. Long testified in deposition that he had worked on many ships, including both commercial and Navy vessels. (Long Dep. Vol. I at 56:24-57:3, ECF No. 93, Ex. B.) He could not remember which specific ships he worked on or which manufacturer's equipment was on each ship. (*Id.* at 58:3-9, 127:18-23.) During the deposition, Long's counsel clarified that Long was not making claims for exposure on Navy ships. (*Id.* at 67:4-9 ("[J]ust so it's clear, in our complaint we disclaimed any Navy exposure, just to put people's minds at ease.")) Later in the deposition, counsel for defendant Crane acknowledged that disclaimer: "I know your counsel said that you're disclaiming Navy exposure." (*Id.* at 393:1-22.)

On September 12, Foster Wheeler removed this action to federal court under 28 U.S.C. § 1442(a)(1), the federal officer removal statute. As its basis for removal, Foster Wheeler relies on Long's medical records that it received during discovery. The medical provider notes in Long's records state that Long previously worked on Navy ships. (Long Medical Records at 2, 4-5, ECF No. 1-3.) Foster Wheeler also points out that Long testified in his deposition that he recalled cleaning up debris after other laborers worked on boilers aboard United States Navy vessels. (Notice of Removal ¶ 7.) Based on Long's medical records and deposition testimony, Foster Wheeler asserts that it is entitled to removal under the federal officer statute because it has a colorable government contractor defense. (*Id.* ¶ 9.)

Long moves to remand the action to state court. In his motion, Long waives "any and all causes of action for any exposures of any kind to asbestos dust while Richard Long was working on Navy vessels (i.e., Navy ships and ferries)," and further disclaims "any and all causes of action that arise from the direction of a federal officer and/or from a federal enclave." (Pl.'s Mot. at 6.) Foster Wheeler opposes the motion, pointing out that: (1) Long disclosed Navy-related exhibits in his initial disclosures; (2) Long disclosed exhibits related to ships that were originally commissioned for the United States government; and (3) Long did not explicitly disclaim potential exposure on Coast Guard vessels in his Motion to Remand. (Def.'s Surreply at 2-3, ECF No. 115.)

The court held oral argument on Long's motion on January 8, 2023. (ECF No. 117.) At oral argument, Long disclaimed any exposure on Navy, Coast Guard, or other government-commissioned vessels.

LEGAL STANDARD

A. *Federal Officer Removal Jurisdiction*

Generally, a civil action is removable to federal court only if it could have been brought there originally. *See* 28 U.S.C. § 1441(a). “When issues of federal law appear on the face of a plaintiff’s well-pleaded complaint, the case falls under a federal district court’s federal question jurisdiction and may be removed on that basis.” *Fisher v. Asbestos Corp.*, Case No. 2:14-cv-02338-WGY-(FFMx), 2014 WL 3752020, at *2 (C.D. Cal. July 30, 2014) (citing *Metro. Life Ins. v. Taylor*, 481 U.S. 58, 63 (1987)). The well-pleaded complaint rule makes the plaintiff “the master of the claim,” meaning “the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 399 (1987). “A corollary to the [well-pleaded complaint] rule is that a defendant typically may not remove an action on the basis of ‘an anticipated or actual federal defense’ to the plaintiff’s state law claims.” *Fisher*, 2014 WL 3752020, at *2 (quoting *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999)).

Cases removed under the federal officer removal statute, however, are not subject to the well-pleaded complaint rule and its corollary principles. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1253 (9th Cir. 2006). Instead, “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 431. The federal officer statute authorizes removal of a civil action brought against any person “acting under” an officer of the United States. 28 U.S.C. § 1442(a)(1). To invoke the statute, a removing party must show that: (1) it is a “person” under

the statute; (2) a causal nexus exists between the plaintiff's claims and the actions the removing party took under a federal officer's direction; and (3) it has a "colorable" federal defense to the plaintiff's claims. *Cabalce v. Thomas E. Blanchard & Assocs.*, 797 F.3d 720, 727 (9th Cir. 2015).

B. *Standard of Review*

In reviewing a motion to remand, the court applies the standard of review applicable to a motion to dismiss for lack of subject matter jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014) ("Challenges to the existence of removal jurisdiction should be resolved within [the] same framework" as Federal Rule of Civil Procedure 12(b)(1) motions, because a motion to remand is "the functional equivalent of a defendant's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1)."). Accordingly, Foster Wheeler "has the burden of proving by a preponderance of the evidence that the requirements for removal jurisdiction have been met." *County of San Mateo v. Chevron Corp.*, 32 F.4th 733, 746 (9th Cir. 2022) (citing *Leite*, 749 F.3d at 1122).

DISCUSSION

A. *Whether a Causal Nexus Exists*

As previously noted, a party seeking to invoke the federal officer statute must show that "a causal nexus exists between the plaintiff's claims and the actions the removing party took pursuant to a federal officer's direction." *Cabalce*, 797 F.3d at 727. To demonstrate that a causal nexus exists here, Foster Wheeler points to Long's medical records and deposition testimony, which suggest that some of Long's asbestos exposure occurred while he was working on United States military vessels. Foster Wheeler argues that remand must be denied because Long's

asbestos injury is indivisible and he therefore cannot waive claims resulting from some asbestos exposures while asserting claims for other exposures contributing to that injury. (Def.’s Resp. at 28.) It also asserts that Long’s waiver is ineffective because it was made after removal and is “circular.” (*Id.* at 7, 20.)

1. Effectiveness of Waiver

Courts in this district and others have concluded that remand is appropriate when a plaintiff alleges asbestos-based injury resulting from work on both commercial and naval vessels but waives claims based on naval exposure or at federal government jobsites, eliminating any causal nexus between the plaintiff’s claims and the defendant’s actions under a federal officer’s direction. *See, e.g., Coury v. Air & Liquid Sys. Corp. (Coury II)*, Case No. 20-cv-264-JR, 2020 WL 3405838 (D. Or. May 22, 2020), *report and recommendation adopted, Coury v. Air & Liquid Sys. Corp. (Coury III)*, 2020 WL 3405204 (D. Or. June 19, 2020); *Fisher*, 2014 WL 3752020, at *3; *Viveros v. Asbestos Corp.*, Case No. CV 14-00190 ABC (VBK), 2014 WL 12572926 (C.D. Cal. Feb. 25, 2014); *Pratt v. Asbestos Corp.*, Case No. C-11-3503 EMC, 2011 WL 4433724 (N.D. Cal. Sept. 22, 2011). Foster Wheeler raises the concern that “it is difficult (at best) to disentangle any harm caused to Mr. Long by equipment aboard civilian vers[u]s government vessels,” and asserts that those “complexities” are for this court to resolve. (Def.’s Resp. at 25.) It is Long, however, who will have to overcome such difficulty to prove liability through exposures on non-government vessels.

That Long’s explicit waiver came after removal does not undermine its effectiveness. *Coury III*, 2020 WL 3405204, at *1 (“Plaintiff’s [post-removal] waiver negates any causal nexus

between Plaintiff's claim and the actions Defendant Foster Wheeler LLC took pursuant to a federal officer's direction."); *Pelker v. Air & Liquid Sys. Corp.*, Case No. 3:17-cv-1107-YY, 2018 WL 679642, at *8-9 (D. Or. Feb. 2, 2018) (concluding that, although removal was proper at the time it occurred, post-removal waiver of claims of asbestos exposure aboard Navy vessels made remand appropriate); *Fisher*, 2014 WL 3752020, at *5; *Lara v. CBS Corp.*, Case No. CV 13-5569 ABC (MANx), 2013 WL 4807168, at *1 (C.D. Cal. Sept. 6, 2013) ("The form of plaintiffs' post-removal waiver does not undercut its effectiveness.").

Further, Long's waiver is not the type of "artful pleading" or "technical legal disclaimer designed to sidestep section 1442" that courts often find insufficient to justify remand. *Fisher*, 2014 WL 3752020, at *4 (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981); *McMann v. Air & Liquid Sys. Corp.*, Case No. 2:14-CV-00281-RSM, 2014 WL 1794694, at *1 (W.D. Wash. May 6, 2014)). Waiver is ineffective when a plaintiff attempts to "plead around the officer removal statute by waiving only federal claims," or makes a circular waiver of "any claims subject to a government contractor defense." *Pratt*, 2011 WL 4433724, at *1 (citing *Ballenger v. Agco Corp.*, 2007 WL 1813821 (N.D. Cal. June 22, 2007)); *McMann*, 2014 WL 1794694, at *1-2.

Here, Long has waived any claim stemming from exposure while working on Navy, Coast Guard, or United States government-commissioned vessels. That disclaimer does not require a state court to evaluate the substance of the federal contractor defense. Long's waiver clarifies that there is no causal nexus between his claims and the actions Foster Wheeler took under a federal officer's direction. *See, e.g., Coury v. Air & Liquid Sys. Corp. (Coury I)*, Case

No. 3:16-cv-1796-SB, [2017 WL 2345688](#), at *3 (D. Or. Mar. 21, 2017) (holding that plaintiff’s “express waiver of any claims related to exposure on Navy ships” was effective in demonstrating that there was no nexus “between [p]laintiff’s claims and any actions that [d]efendant took pursuant to a federal officer’s direction”), *report and recommendation adopted*, [2017 WL 2345584](#) (D. Or. May 26, 2017).

2. Effect of Discovery on Waiver

According to Foster Wheeler, Long’s deposition testimony and initial disclosures contradict his assertion that he is not bringing any claims based on Navy exposure. (Def.’s Resp. at 22; Def.’s Surreply at 2-4.) Foster Wheeler points out that Long indicated in his deposition that he might have been exposed to asbestos while working on or near Naval or Coast Guard vessels. Foster Wheeler also draws the court’s attention to Long’s proposed trial exhibits, including 400 Navy-related exhibits. Some of Long’s exhibits relate to ships commissioned by the federal government that were commercially owned when Long worked on them. (Def.’s Surreply at 3.)

At oral argument, Long clarified that he disclaims any exposure on vessels commissioned by the United States government, including all Navy and Coast Guard vessels. He also offered two reasons why his disclosure of Navy-related exhibits does not undermine his waiver. *First*, Navy-related documents may be relevant to claims for exposure on commercial ships, because Foster Wheeler’s asbestos-containing products in Navy and commercial ships were nearly identical. *Second*, out of an abundance of caution, Long’s counsel disclosed all potentially relevant exhibits (from an exhibit list that is not case-specific) in Long’s initial disclosures. Long

has since clarified that the disclosures are not his proposed exhibits for trial and that he continues to disclaim any exposure on Navy, Coast Guard, or government-commissioned ships.

Discovery related to government-commissioned vessels does not alter Long's waiver of claims for exposure on such vessels. *See Coury III*, 2020 WL 3405204, at *1 (“Plaintiff’s discovery requests [related to Navy vessels] do not alter her waiver of any claims arising out of Mr. Coury’s purported exposure to naval asbestos.”). Indeed, the Navy-related exhibits “may well be relevant” to proving asbestos exposure on commercial ships or “when it comes time to determine fault and/or allocate damages among the various defendants.” *Viveros*, 2014 WL 12572926, at *2 (emphasis omitted). “But that such matters are relevant does not equate to a formal ‘defense’ because [Long] ha[s] foregone claims to any such damages.” *Id.*

Long has repeatedly represented, both before and after removal, that he does not intend to bring any claims for asbestos exposure on Navy vessels. He did not allege exposure on Navy vessels in his Complaint, nor did he assert claims based on Navy exposure. To the extent that discovery created any ambiguity as to whether Long brings claims based on exposure on Navy, Coast Guard, or government-commissioned vessels, that ambiguity has been resolved through Long’s explicit waiver of such claims.

Foster Wheeler has not met its burden of proving—either at the time of removal or post-removal—the requisite nexus between Long’s claims and any actions that Foster Wheeler took under a federal officer’s direction. “To deny remand of this case would affirm [Foster Wheeler]’s right to assert a defense against a claim that does not exist, an absurd result.” *Fisher*, 2014 WL 3752020, at *3. Because Foster Wheeler has failed to demonstrate a causal nexus between

Long's claims and any actions it took pursuant to a federal officer's direction, this court lacks jurisdiction under the federal officer removal statute.

B. Admiralty Jurisdiction

Foster Wheeler argues that, even if Long's waiver is effective and there is no basis for federal officer removal jurisdiction, Long's claims are "immune to discretionary remand under [28 U.S.C.] § 1367(c)" because they fall within this court's original admiralty jurisdiction.² (Def.'s Resp. at 29.) Foster Wheeler relies on *Williams v. Costco Wholesale Corp.*, where the Ninth Circuit held that a district court had no discretion to remand when the plaintiff's post-removal amendment that waived the federal law-based claim on which the removal rested gave rise to grounds for asserting diversity jurisdiction. 471 F.3d 975, 977 (9th Cir. 2006). The court concluded that it would be illogical to require a defendant to file a supplemental notice of

² In *James B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, the Supreme Court announced that a party seeking to invoke federal admiralty jurisdiction must pass a location test and a connection test. 513 U.S. 527, 534 (1995). The parties dispute whether the connection test is met here. That test requires the party invoking admiralty jurisdiction to show both that (1) the type of incident involved has a potentially disruptive impact on maritime commerce, and (2) the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity. *Id.*

Before the Supreme Court announced the two-part *Grubart* test, the Ninth Circuit, applying a four-part test, determined in *Myrhan v. Johns-Manville Corp.* that claims for injuries arising out of asbestos exposure during the repair of ships in navigable waters did not fall within federal admiralty jurisdiction. 741 F.2d 1119, 1122 (9th Cir. 1984). In Long's view, because *Myrhan* has not been overruled, that holding is instructive. (Pl.'s Reply at 27-28.) Foster Wheeler, in contrast, asserts that because *Myrhan* did not apply the correct test and because the Ninth Circuit has, since *Grubart*, significantly broadened the universe of claims to which admiralty jurisdiction applies, *Myrhan* has been implicitly overruled. (Def.'s Surreply at 5.) The court does not address whether *Grubart*'s connection test is met here because it concludes that, even if it is, remand is appropriate.

removal for a case that had already been properly removed, explaining: “Once a case has been properly removed, the district court has jurisdiction over it on all grounds apparent from the complaint, not just those cited in the removal notice.” *Id.* at 977.

Foster Wheeler’s reliance on *Williams* is based on the mistaken premise that removal was proper at the time it occurred. As explained above, even before Long’s post-removal waiver, his Complaint did not allege exposures on Navy or other military ships. Also before removal, Long’s counsel clarified that Long was not bringing claims for Navy exposure. Because Long never brought any claims for Navy, Coast Guard, or other government-commissioned vessel exposure, removal was improper at the time it occurred, and remand is therefore appropriate. *Coury I*, 2017 WL 2345688, at *3 (concluding that “the Court need not address the appropriateness of discretionary remand under § 1367, because the case was not properly removed”).

Even if removal was proper at the time it occurred, there is no longer a basis for removal jurisdiction. Removal jurisdiction is distinct from original subject matter jurisdiction: there may be a defect in removal jurisdiction despite the existence of original jurisdiction. *See County of San Mateo*, 32 F.4th at 763-64 (concluding that remand is appropriate even in the presence of claims that fall under the court’s original admiralty jurisdiction because those claims do not create removal jurisdiction); *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1069 (9th Cir. 2001) (distinguishing between removal jurisdiction and original subject matter jurisdiction).

Under the “saving to suitors” clause of 28 U.S.C. § 1331(1), “when a plaintiff brings a maritime cause of action against a person in state court, a federal court lacks admiralty jurisdiction over that claim. In order to remove such a claim to federal court, the defendant must

assert some other basis of jurisdiction, such as diversity jurisdiction.” *County of San Mateo*, 32 F.4th at 763. Because Long has explicitly waived any claims to which a federal defense could apply, and admiralty jurisdiction does not justify removal, there is no basis for removal jurisdiction here. Accordingly, even if removal was proper at the time it occurred, this court has discretion under 28 U.S.C. § 1367(c) to remand. *See Williams*, 471 F.3d at 976 (“Dismissal of the federal claim would thus, ordinarily, have authorized the district court to remand the pendent state law claims.” (citing 28 U.S.C. § 1367(c))); *Pelker*, 2018 WL 679642, at *8 (“[P]recedent suggests that when federal (or removable) claims have been waived—or voluntarily dismissed by a plaintiff—a district court has discretion to remand.” (citing *Williams*, 471 F.3d at 976)).

The cases that Foster Wheeler relies on are distinguishable. In each of those cases, post-removal amendments eliminated the original basis for removal jurisdiction but left a potential alternative basis for removal jurisdiction. *Williams*, 471 F.3d at 977 (holding that district court had no discretion to remand where elimination of federal question claim created complete diversity); *Jefferson v. Certain Underwriters at Lloyd’s London*, 658 F. App’x 738, 740-43 (5th Cir. 2016) (holding that district court had no discretion to remand if dismissal of foreign entities who had removed under the Foreign Sovereign Immunities Act created complete diversity); *Buchner v. FDIC*, 981 F.2d 816 (5th Cir. 1993) (holding that district court had no discretion to remand after plaintiffs dismissed claims against defendants who had properly removed under federal officer statute where remaining claims presented a federal question). Those cases are consistent with the view that the court has discretion to remand in the absence of removal jurisdiction.

The court's decision whether to remand under 28 U.S.C. § 1367(c) is discretionary and is informed by values of "economy, convenience, fairness, and comity." *Acri v. Varian Assocs.*, 114 F.3d 999, 1001 (9th Cir. 1997) (en banc). This case is in the early stages of litigation. And, absent claims that arise from exposure on United States military vessels, it belongs in state court. The court therefore concludes that the values of economy, convenience, fairness, and comity are best served by remand.

C. Failure to Confer

Local Rule of Civil Procedure 7-1(a) requires a party making a motion to certify that the parties made a good-faith effort to resolve the dispute and have been unable to do so. It further requires that, when conferring, the parties discuss each issue that is the subject of the proposed motion. LR 7-1(a). Foster Wheeler asks that the court deny Long's Motion to Remand because he failed to confer with defendants before filing the motion. (Def.'s Resp. at 17.) Long disputes Foster Wheeler's contention that he failed to confer. (Pl.'s Reply at 10, ECF No. 97.)

"The obvious purpose of Local Rule 7-1 is to encourage parties to resolve amicably disputes when possible, preserving judicial resources for those matters that require the court's intervention." *Thompson v. Federico*, 324 F. Supp. 2d 1152, 1172 (D. Or. 2004). Here, the parties had some conversation about Long's intention to file the Motion to Remand and to seek resolution on an expedited basis. During Long's deposition, his counsel Ethan Horn stated on the record:

Before we get going, just let this, let this be our official meet and confer on our intention to have the case remanded back to state court. And also our meet and confer on our intent to do it on an expedited basis. I presume [there] will be some resistance to that, so – but that's that. That's all I got.

(Long Dep. Vol. II at 195:20-196:1, ECF No. 93, Ex. C.) Horn represents that, when he said, “I presume there will be some resistance to that,” defense counsel around the table nodded their heads. (Horn Decl. at 2, ECF No. 99.) Horn also told defense counsel that he hoped to file the Motion to Remand within the week. (Long Dep. Vol. II at 196:13-14.) Defense counsel asked what the briefing schedule would be, and Horn explained that he would follow the court’s briefing schedule, adding “if you feel you want a certain amount of time just let us know and we can try to work something out.” (*Id.* at 196:23-25.) From Horn’s perspective: “It was clear to me that defense counsel understood my intention in the meet and confer and that they would oppose the motion to remand. I had no reason to believe that their attitude would change in the time before the motion to remand was filed.” (Horn Decl. at 2.)

Foster Wheeler does not contend that Horn was incorrect in concluding that it would oppose the motion to remand. In light of Horn’s representations and his statements to defense counsel, the court concludes that Long complied with the LR 7-1(a) for purposes of his Motion to Remand.

CONCLUSION

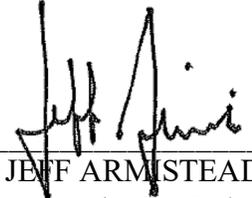
For the above reasons, Long’s Motion to Remand (ECF No. 84) should be GRANTED.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due within 14 days. If no objections are filed, the Findings and Recommendation will go under advisement on that date. If objections are filed, a response is due within 14 days. When the

response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED: January 31, 2024

A handwritten signature in black ink, appearing to read "Jeff Armistead", is written over a horizontal line.

JEFF ARMISTEAD
United States Magistrate Judge