

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
EASTERN DIVISION**

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HUS HARI BULJIC INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SEDIKA BULJIC, HONARIO GARCIA INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF REBERIANO LENO GARCIA, AND ARTURO DE JESUS HERNANDEZ AND MIGUEL ANGEL HERNANDEZ AS CO-ADMINISTRATORS OF THE ESTATE OF JOSE AYALA,

PLAINTIFFS,

v.

TYSON FOODS, INC., TYSON FRESH MEATS, INC., JOHN H. TYSON, NOEL W. WHITE, DEAN BANKS, STEPHEN R. STOUFFER, TOM BROWER, MARY A. OLEKSIUK, ELIZABETH CROSTON, TOM HART, HAMDIA BEGANOVIC, JAMES COOK, RAMIZ MUHELJIC, GUSTAVO CABAREA, PUM PISNG, ALEX BUFF, WALTER CIFUENTES, MUWI HLAWNCEU, CODY BRUSTKERN, MARK SMITH, AND JOHN/JANE DOES 1-10,

DEFENDANTS.

Case No. 6:20-cv-02055-KEM

**PLAINTIFFS' BRIEF IN SUPPORT OF  
MOTION TO REMAND**

**SUMMARY**

Defendants Tyson Foods, Inc. and Tyson Fresh Meats, Inc. (collectively "Tyson") needlessly and knowingly exposed Sedika Buljic, Reberiano Garcia, and Jose Ayala to COVID-19. As a result, Ms. Buljic stopped working on April 14, 2020, and died four days later.<sup>1</sup> Mr. Garcia stopped working on April 11 and died twelve days later.<sup>2</sup> Mr. Ayala was hospitalized and intubated on April 13, and died on May 25 after six weeks on life-support.<sup>3</sup>

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<sup>1</sup> Ex. A, Buljic Affidavit.

<sup>2</sup> Ex. B, Garcia Affidavit.

<sup>3</sup> Ex. C, Hernandez Affidavit.

Tyson asserts that this case is removable on the basis of a Presidential Executive Order issued on April 28, 2020. According to Tyson, removal is proper because: (1) Plaintiffs’ “challenge actions taken by Tyson at the direction” of the April 28 Executive Order, and (2) Plaintiffs’ “Petition raises substantial and disputed issues of federal law under the Defense Production Act,” which was enacted under the April 28 Order.<sup>4</sup> Both assertions rest on the same flawed premise: that a Presidential Executive Order issued on April 28, 2020 has any relation to or bearing on claims that accrued before the Order was issued. Because Ms. Buljic, Mr. Garcia, and Mr. Ayala all contracted the virus, stopped working, and were dead or dying weeks before the executive order was issued, Tyson has not and cannot demonstrate any of the decedents were sickened or died as a result of the Executive Order. Accordingly, removal was improper. It necessarily follows that this matter must be remanded.

### **BACKGROUND**

#### ***Tyson’s Tortious Conduct***

Ms. Buljic, Mr. Garcia, and Mr. Ayala are dead because of Tyson’s incorrigible, willful and wanton disregard for workplace safety. Instead of educating employees about the dangers of COVID-19, Tyson warned them not to discuss the virus at work.<sup>5</sup> Instead of encouraging sick employees to stay home, Tyson offered \$500 bonuses for perfect attendance.<sup>6</sup> Instead of pausing or slowing production, Tyson redirected hogs from a neighboring plant to the Waterloo Facility.<sup>7</sup> And instead of providing personal protective equipment or implementing safety measures to protect employees, Tyson aggressively lobbied President Trump and Vice President Pence for liability protections.<sup>8</sup>

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<sup>4</sup> Doc. 1, Notice of Removal at 1-2.

<sup>5</sup> Petition at ¶ 78.

<sup>6</sup> *Id.* at ¶ 77.

<sup>7</sup> *Id.* at ¶ 62.

<sup>8</sup> *Id.* at ¶ 79.

### ***The Executive Order***

On April 28, 2020, President Trump issued an Executive Order “Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19.”<sup>9</sup> Notwithstanding Tyson’s assertion to the contrary, President Trump neither mandated nor forgave Tyson’s reprehensible conduct. Rather than compel any action, the order merely: (1) declared that meat and poultry in the food supply chain fall under Section 101(b) of the Defense Production Act; and (2) delegated the president’s Defense Production Act authority over the food supply chain to Secretary of Agriculture Sonny Perdue.<sup>10</sup> The order further instructed Secretary Perdue to take all appropriate actions “to ensure America’s meat and poultry processors continue operations” consistent with guidance from the CDC and OSHA.<sup>11</sup> Subsequently, on May 5, 2020, Secretary Perdue issued a letter to meat processing companies declaring that meat processing plants “closed since Friday May 1, and without a clear timetable for near term resumption of operations, should submit written documentation of their operations and health and safety protocol” to the Department of Agriculture.<sup>12</sup> Neither President Trump nor Secretary Purdue mandated Tyson to keep the Waterloo Facility open.

### **LEGAL STANDARD**

#### **A. The removing party bears the burden of establishing federal jurisdiction.**

“A defendant may remove a state law claim to federal court only if the action originally could have been filed there.” *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 619 (8th Cir. 2010).

“The party seeking removal to federal court bears the burden of demonstrating that removal was proper, even under the Federal Officer Removal Statute.” *Graves v. 3M Co.*, No. CV 19-3094

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<sup>9</sup> See White House Presidential Actions, Executive Orders (April 28, 2020), *available at* <https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> USDA Letter to Stakeholders (May 5, 2020), *available at* <https://www.usda.gov/sites/default/files/documents/stakeholder-letters-covid.pdf>.

(JRT/KMM), 2020 WL 1333135, at \*3 (D. Minn. Mar. 23, 2020) (citing *Bor-Son Bldg. Corp. v. Heller*, 572 F.2d 174, 181 n.13 (8th Cir. 1978)). “This burden is met by a substantial factual showing that supports candid, specific and positive allegations.” *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 819 (10th Cir. 2020) (internal quotations and citations omitted). “[A]ll doubts about federal jurisdiction must be resolved in favor of remand.” *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 912 (8th Cir. 2009).

### **ARGUMENT AND AUTHORITIES**

**A. Federal officer removal is improper because Tyson failed to identify any federal directive that existed at the time decedents were working for Tyson, failed to establish causation between a directive and the company’s tortious conduct, and failed to raise a colorable federal defense.**

A defendant corporation seeking federal officer removal must demonstrate that: (1) it was “acting under” the direction of a federal officer when it engaged in the allegedly tortious conduct; (2) there is a causal connection between the official authority and the defendant’s actions; and (3) it has a “colorable” federal defense to state-law liability. *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1230 (8th Cir. 2012).

**1. Tyson was not “acting under” the direction of a federal officer when it engaged in tortious conduct giving rise to Plaintiffs’ claims.**

The Federal Officer Removal Statute “permits removal only if [the defendant], in carrying out the ‘act[s]’ that are the subject of the petitioners’ complaint, was ‘acting under’ any ‘agency’ or ‘officer’ of ‘the United States.’” *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 147 (2007) (alteration in original) (quoting 28 U.S.C. § 1442(a)(1)). Tyson argues that it “acted under” the direction of a federal officer under the following theory: President Trump’s April 28 Executive Order “instructed that Tyson and other meat and poultry processing companies to [*sic*] stay open

and continue operations, subject to the supervision of the Secretary of Agriculture.”<sup>13</sup> In other words, Tyson would have this Court believe that it had no choice but to maintain uninterrupted operations at the Waterloo Facility—even in the face of an uncontrolled COVID-19 outbreak at the plant—because the company was federally mandated to do so. This argument fails for a litany of reasons.

First, Plaintiffs did not sue Tyson for actions taken subsequent to President Trump’s April 28 Executive Order. Plaintiffs sued Tyson for needlessly and knowingly infecting Ms. Buljic, Mr. Garcia, and Mr. Ayala with COVID-19 during the first half of April (all three were infected and stopped working on or before April 14). Accordingly, Tyson must establish that it was “acting under” a federal officer during the period of time the decedents were still working at the Waterloo Facility. *Id.* Whether or not Tyson was acting under a federal officer as of April 28 is wholly irrelevant to Plaintiffs’ claims.<sup>14</sup>

Second, Plaintiffs did not sue Tyson (or any other Defendant) for failing to shut down the Waterloo Facility. Plaintiffs sued Tyson for fraudulent misrepresentation and seek to hold the company vicariously liable for its executives and managers’ gross negligence. Plaintiffs specifically contend that Tyson’s executives and managers violated their duty through twenty-nine acts and omissions, none of which include failing to shut down the facility.<sup>15</sup> The Petition only references Tyson’s “prolonged refusal to temporarily close down” the facility as “evidence of Tyson’s incorrigible, willful and wanton disregard for workplace safety and culpable state of

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<sup>13</sup> Doc. 1 at 3.

<sup>14</sup> Moreover, to the extent Tyson implies that it was acting under the direction of President Trump’s March 16 “Coronavirus Guidelines” to employees (Doc. 1 at 4), this too is an insufficient basis for federal officer removal. It is well settled that “a private firm’s compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase ‘acting under’ a federal ‘official.’” *Watson*, 551 U.S. at 143.

<sup>15</sup> Petition at ¶¶ 119 (a)-(cc), 135 (a)-(cc)

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