UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARC DUPERVIL, as the Proposed Administrator of the Estate of FREDERIC DUPERVIL, Deceased,

Plaintiff,

- against -

ALLIANCE HEALTH OPERATIONS, LCC, d/b/a LINDEN CENTER FOR NURSING AND REHABILITATION, and JOHN AND JANE DOES 1–10,

Defendants.

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MEMORANDUM & ORDER
20-CV-4042 (PKC) (PK)

PAMELA K. CHEN, United States District Judge:

This case arises from the death of Plaintiff's father, who passed away after contracting COVID-19 while residing at a nursing home in Brooklyn, New York. Plaintiff filed suit in state court against the nursing home and unnamed health care professionals working at the facility, asserting various state-law claims for negligence, gross negligence, wrongful death, malpractice, and violation of New York Public Health Law. Defendants removed the matter to this Court on two alleged, independent grounds: (1) that there is federal-question jurisdiction; and (2) that Defendants are federal officers entitled to a federal forum. Plaintiff presently moves to remand. Because this case presents no question of federal law that confers jurisdiction on the Court, and because Defendants cannot be considered federal officers, the Court grants the motion to remand.

BACKGROUND

I. Case Background

Plaintiff is the proposed administrator of his father's estate. (Complaint, Dkt. 1-1, ¶¶ 1–2.) Plaintiff's father, a resident of the State of New York, lived at the Linden Center for Nursing

and Rehabilitation ("Linden Center") in Brooklyn. (*Id.* ¶¶ 4–5.) While residing at Linden Center, Plaintiff's father contracted COVID-19, and died as a result on April 1, 2020. (*Id.* ¶¶ 33–34.)

Following his father's death, Plaintiff filed this suit in the Supreme Court of New York, Kings County, on May 26, 2020. The crux of Plaintiff's complaint is that the Linden Center and health care professionals working at the facility (collectively, "Defendants") failed to take precautions to prevent the spread of COVID-19, which ultimately caused the death of Plaintiff's father. (*Id.* ¶ 35.) In particular, Defendants allegedly "failed to appropriate[ly] separate residents in accordance with local, state and federal guidance"; "failed to enforce social distancing among residents"; "failed to enforce social distancing among staff"; "failed to cancel all group activities and communal dining"; "failed to timely restrict all visitors"; "failed to ensure appropriate staffing levels"; "failed to ensure all residence [*sic*] wear a cloth face covering"; "failed to ensure all health care professionals were provided a facemask or cloth covering while in the facility"; "failed to ensure all health care professionals wore a facemask or cloth covering while in the facility"; "failed to adequately screen volunteers and non-essential healthcare personnel prior to allowing their entrance into the facility"; "failed to actively screen everyone entering the building for fever and symptoms of COVID-19"; and "failed to monitor local, state and federal health guidance on the coronavirus for maintaining the safety of its residents." (*Id.* ¶¶ 110–21; *see also id.* ¶¶ 134–45, 158–69.) The Complaint alleges various state-law claims of negligence, gross negligence, wrongful death, medical and nursing malpractice, and violation of New York Public Health Law. (*Id.* ¶¶ 57–197.)

On August 31, 2020, Defendants filed a Notice of Removal, asserting two independent grounds for removal. (*See* Notice of Removal, Dkt. 1.) First, Defendants argue that the case is removable under 28 U.S.C. § 1441(a) because it is one "arising under" federal law within the

meaning of 28 U.S.C. § 1331. (*Id.* ¶ 9.) Specifically, according to Defendants, although Plaintiff's claims sound in state tort law, the claims are completely preempted by, or necessarily and significantly implicate, the Public Readiness and Emergency Preparedness ("PREP") Act, 42 U.S.C. § 247d-6d. (*Id.* ¶¶ 14–16, 20–24.) Second, and alternatively, Defendants argue that the case is removable under 28 U.S.C. § 1442(a)(1) because Defendants are federal officers or the equivalent. (*Id.* ¶ 12.) Defendants assert that they qualify for federal-officer removal under § 1442(a)(1) because "the Centers for Medicare and Medicaid Services ('CMS') and the Centers for Disease Control ('CDC') specifically compelled healthcare providers and nursing homes to respond to the COVID-19 pandemic," and therefore, Defendants were "acting under specific federal instructions/regulations." (*Id.* ¶ 13.) Plaintiff timely moved to remand. (*See* Motion to Remand ("Mot."), Dkt. 11.)

II. PREP Act

The PREP Act generally provides that

> a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration [by the Secretary of Health and Human Services] has been issued with respect to such countermeasure.

42 U.S.C. § 247d-6d(a)(1). In March 2020, the Secretary of Health and Human Services ("the Secretary") issued a declaration under the PREP Act regarding the COVID-19 pandemic. 85 Fed. Reg. 15,198 (Mar. 17, 2020). The Declaration has since been amended five times. *See* First Amended Declaration, 85 Fed. Reg. 21,012 (Apr. 15, 2020); Second Amended Declaration, 85 Fed. Reg. 35,100 (June 8, 2020); Third Amended Declaration, 85 Fed. Reg. 52,136 (Aug. 24, 2020); Fourth Amended Declaration, 85 Fed. Reg. 79,190 (Dec. 9, 2020); Fifth Amended Declaration, 86 Fed. Reg. 7,872 (Feb. 2, 2021).

A "covered countermeasure" under the PREP Act is defined as "a qualified pandemic or epidemic product"; "a security countermeasure"; a "drug . . . , biological product . . . , or device . . . that is authorized for emergency use in accordance with section 564, 564A, or 564B of the Federal Food, Drug, and Cosmetic Act [*i.e.*, FDCA]"; or "a respiratory protective device that is approved by the National Institute for Occupational Safety and Health [*i.e.*, NIOSH], . . . and that the Secretary determines to be a priority for use during a public health emergency declared under section 247d of this title." 42 U.S.C. § 247d-6d(i)(1). The statute in turn defines both a "qualified pandemic or epidemic product" and a "security countermeasure." A qualified pandemic or epidemic product is a "drug," "biological product," or "device" that is

> (i) a product manufactured, used, designed, developed, modified, licensed, or procured (I) to diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic; or (II) to limit the harm such pandemic or epidemic might otherwise cause;
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> (ii) a product manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a serious or life-threatening disease or condition caused by a product described in clause (i); or
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> (iii) a product or technology intended to enhance the use or effect of a drug, biological product, or device described in clause (i) or (ii)[.]

Id. § 247d-6d(i)(7)(A). Such drug, biological product, or device must also be approved or cleared under the FDCA, licensed under the Public Health Service Act ("PHSA"), subject to an exemption, or authorized for emergency use. *Id.* § 247d-6d(i)(7)(B). A security countermeasure is a "drug," "biological product," or "device" that

> (i)(I) the Secretary determines to be a priority . . . to diagnose, mitigate, prevent, or treat harm from any biological, chemical, radiological, or nuclear agent identified as a material threat [by the Secretary of Homeland Security], or to diagnose, mitigate, prevent, or treat harm from a condition that may result in adverse health consequences or death and may be caused by administering a drug, biological product, or device against such an agent; (II) the Secretary determines . . . to be a necessary countermeasure; and (III) (aa) is approved or cleared under [the FDCA] or licensed under [the PHSA]; or (bb) is a countermeasure for which the Secretary

> determines that sufficient and satisfactory clinical experience or research data (including data, if available, from pre-clinical and clinical trials) support a reasonable conclusion that the countermeasure will qualify for approval or licensing within 10 years after the date of a determination [that procurement of the countermeasure is appropriate]; or
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> (ii) is authorized for emergency use under section 564 of the [FDCA].

Id. § 247d-6b(c)(1)(B); *see also id.* § 247d-6d(i)(1)(B). A "biological product" is "a virus, therapeutic serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, protein, or analogous product, or arsphenamine or derivative of arsphenamine (or any other trivalent organic arsenic compound), applicable to the prevention, treatment, or cure of a disease or condition of human beings." *Id.* § 262(i); *see also id.* §§ 247d-6b(c)(1)(B), 247d-6d(i)(7). The term "device," which is adopted from the FDCA, means "an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory" that is

> (1) recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to them, (2) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or (3) intended to affect the structure or any function of the body of man or other animals, and
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> which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of its primary intended purposes.

21 U.S.C. § 321(h); *see also* 42 U.S.C. §§ 247d-6b(c)(1)(B), 247d-6d(i)(7).

In accordance with the various terms of the PREP Act, the Secretary's March 2020 Declaration under the Act specifically defines a "covered countermeasure" as

> any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom, or any device used in the administration of any such product, and all components and constituent materials of any such product.

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