

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION**

Rolandette Glenn; Idell Bell; §
Kerry Cartwright; Tammy §
Fletcher; Laveka Jenkins; §
Kiesha Johnson; Ronald Johnson; §
Daisy Williams; Danica Wilson; §
John Wyatt; Crystal Wyatt; and §
Clifford Bell, Individually and §
as Personal Representative of the §
Estate of Beverly Whitsey, §

Plaintiffs, §

v. §

Tyson Foods, Inc.; Jason Orsak; §
Erica Anthony; and Maria Cruz, §

Defendants. §

**CIVIL ACTION NO.
9:20-cv-00184**

DEFENDANT TYSON FOODS INC.’S NOTICE OF REMOVAL

Defendant Tyson Foods, Inc. (“Tyson”) removes the civil action styled “*Rolandette Glenn, et al., v. Tyson Foods, Inc., et al.*,” Case No. 20CV35275, from the 273rd Judicial District Court of Shelby County, Texas, to this Court under 28 U.S.C. §§ 1331, 1441, 1442, and 1446. This Court has subject matter jurisdiction, and the case is removable because:

- (1) Plaintiffs’ First Amended Petition (“Petition”) challenges actions taken by Tyson at the direction of a federal officer, for which Tyson will have a colorable federal defense (28 U.S.C. § 1442(a)(1)); and
- (2) The Petition raises substantial and disputed issues of federal law under the Defense Production Act that must be decided by a federal forum (28 U.S.C. § 1331(a)(1)).

Removal is timely. Tyson was added as a party to this case for the first time with the filing of the First Amended Petition that was served on Tyson on August 6, 2020. This Notice is being filed within 30 days of service. *See* 28 U.S.C. § 1446(b)(1); *Bd. of Regents of Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp.*, 478 F.3d 274, 278 (5th Cir. 2007).

Tyson provides the following short and plain statement of the grounds for removal:

BACKGROUND

The United States continues to struggle with a global pandemic whose size and scope are without modern precedent. Millions have been infected with the novel coronavirus, and more than 180,000 Americans have died of COVID-19. The economic fallout and human suffering resulting from the pandemic have been severe. This case is brought by a group of past and present Tyson employees who allege that they worked at a Tyson poultry-processing facility; that they contracted COVID-19 at work; and that they were harmed by the disease. In addition, a family member of one of those employees—Beverly Whitsey—alleges that she contracted the disease at work and later died of the disease. That death, and the harm caused to the thousands of individuals who have contracted COVID-19, is tragic.

But Plaintiffs' allegations—including allegations of willful misconduct directed not only against Tyson, but also against three Tyson employees—are inaccurate and incorrect. Tyson has worked hard from the earliest days of the pandemic to follow federal workplace guidelines and has invested millions of dollars to provide employees with safety and risk-mitigation equipment. Tyson's efforts to protect its workers while continuing to supply Americans with food in the face of the pandemic continue to this day.

Removal is proper because federal court is the correct forum for resolving Plaintiffs' claims. Plaintiffs allege that Tyson failed to safely operate its facility in

Center, Texas during the COVID-19 pandemic. But that facility was operating pursuant to the President of the United States' authority to order continued food production and under the direct supervision of the U.S. Secretary of Agriculture. As the President emphasized, “[i]t is important that processors of beef, pork, and poultry . . . in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans,” and any “closures [of such facilities] threaten the continued functioning of the national meat and poultry supply chain” and “undermin[e] critical infrastructure during the national emergency.” *Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources during the National Emergency Caused by the Outbreak of COVID-19* (“*Food Supply Chain Resources*”), 85 Fed. Reg. 26,313, 26,313, 2020 WL 2060381, at *1 (Apr. 28, 2020).¹ The President and the U.S. Secretary of Agriculture provided detailed instruction for poultry-processing facilities to continue operating, incorporating industry-specific guidance from the Centers for Disease Control and Prevention (“CDC”) and the Occupational Safety and Health Administration (“OSHA”).

Because Tyson was under a Presidential order to continue operations pursuant to the supervision of the federal government and pursuant to federal guidelines and directives, including directives from the Secretary of Agriculture and guidance from the CDC and OSHA, federal court is the proper forum for resolving this case.

ARGUMENT

I. Federal officer removal is proper under 28 U.S.C. § 1442(a)(1).

Under 28 U.S.C. § 1442(a)(1), a civil action may be removed to federal court if the action is asserted against a person acting under the direction of a federal officer:

¹ <https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/>.

A civil action . . . that is against or directed to any of the following may be removed . . . :

(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, in an official or individual capacity, for or relating to any act under color of such office

28 U.S.C. § 1442(a)(1) (emphasis added).

Here, federal officer removal is proper because (1) Tyson “is a ‘person’ within the meaning of the statute,” (2) Tyson “has acted pursuant to a federal officer’s directions,” (3) “the charged conduct is connected or associated with an act pursuant to a federal officer’s directions[,]” and (4) Tyson “has asserted a colorable federal defense[.]” *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (en banc).²

Tyson is a “person.” Tyson is a “person” under 28 U.S.C. § 1442 because the term includes both “private persons and corporate entities.” *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 461 (5th Cir. 2016), *overruled on other grounds by, Latiolais*, 951 F.3d 286 (citations omitted).

Federal Direction. On March 13, 2020, the President declared “a National Emergency in response to the COVID-19 outbreak.” Exec. Office of Pres., *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337, 15,337, 2020 WL 1227639 (Mar. 13, 2020). Soon after, on March 16, the President issued “Coronavirus Guidelines” emphasizing that employees in “critical infrastructure industr[ies]”—including companies like Tyson that are

² Because Tyson is entitled to remove this case under 28 U.S.C. § 1442(a)(1), “the entire case [is] deemed removable, such that [Plaintiffs’] claims against all other defendants . . . will be heard in federal court as well.” *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 606 (5th Cir. 2018); *see also* Wright & Miller, 14C Fed. Prac. & Proc. § 3726 (Rev. 4th ed.) (“Because Section 1442(a)(1) authorizes removal of the entire action even if only one of the controversies it raises involves a federal officer or agency, the section creates a species of statutorily-mandated supplemental subject-matter jurisdiction.”).

essential to maintaining food-supply chains and ensuring the continued health and safety of all Americans—have a “special responsibility to maintain [their] normal work schedule.” Exec. Office of Pres., *The President’s Coronavirus Guidelines for America* at 2 (Mar. 16, 2020).³ On March 25, President Trump approved a major disaster declaration for the State of Texas in response to the COVID-19 outbreak. Exec. Office of Pres., *President Donald J. Trump Approves Texas Disaster Declaration* (Mar. 25, 2020).⁴

On April 28, consistent with the directions in March and because of attempts by localities to countermand federal directions, President Trump issued an executive order. This time expressly invoking his authority under the Defense Production Act (“DPA”), 50 U.S.C. §§ 4501 *et seq.*, the President again instructed Tyson and other meat and poultry processing companies to stay open and continue operations, subject to the supervision of the Secretary of Agriculture. *See Food Supply Chain Resources*, 85 Fed. Reg. at 26,313, 2020 WL 2060381, at *1. The executive order states in relevant part:

It is important that processors of beef, pork, and poultry (“meat and poultry”) in the food supply chain **continue operating and fulfilling orders** to ensure a continued supply of protein for Americans. [R]ecent actions in some States have led to the complete closure of some large processing facilities.

* * *

Such closures **threaten the continued functioning** of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency.

³ https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

⁴ <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-approves-texas-disaster-declaration-6/#:~:text=Today%2C%20President%20Donald%20J.,20%2C%202020%2C%20and%20continuing.>

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