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

ROLANDETTE GLENN ET AL.	§	CASE NO. 9:20-CV-184
	§	
v.	§	JUDGE MICHAEL TRUNCALE
	§	
TYSON FOODS, INC. ET AL.	§	
	§	

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND

Pending before the Court is Plaintiffs' Motion to Remand. (Doc. #13). Plaintiffs seek to have this case remanded to state court, alleging that the defendants, Tyson Foods, Inc. ("Tyson"), Jason Orsak, Erica Anthony, and Maria Cruz, have not carried their burden to establish federal officer or federal question jurisdiction. After considering the motion, arguments from the parties, and the applicable law, the Court grants Plaintiffs' Motion to Remand. (Doc. #13).

I. BACKGROUND

Plaintiffs are eleven past and present workers of Defendant Tyson who allege that they contracted COVID-19 while working at a Tyson poultry-processing facility and a personal representative of a twelfth worker who allegedly died as a result of contracting the virus at work. (Doc. #3, at 3–4). More specifically, Plaintiffs allege that despite a stay-at-home order issued by Governor Abbott that went into effect on April 2, 2020, Plaintiffs were required to continue working at the Tyson meatpacking plant in Center, Texas ("Center Facility"). *Id.* at 5. They assert that both before and after the April 2 stay-at-home order, Tyson failed to take adequate precautions to protect the workers at its meatpacking facilities from COVID-19. *Id.*

At all relevant times during the events alleged the first amended petition, Defendant Jason Orsak was a complex safety manager for Tyson and Defendants Erica Anthony and Maria Cruz

were safety coordinators for Tyson. *Id.* at 4. Plaintiffs allege those defendants were directly responsible for implementing and enforcing adequate safety measures to prevent the spread of COVID-19 but failed to do so. *Id.* at 5–6. More specifically, Plaintiffs allege that Orsak and Anthony failed to issue masks to employees, institute six feet barriers between employees, limit contact between employees, and create rideshare alternatives to the Center Facility's bus system. *Id.* at 6. Allegedly, as a direct result of the negligence and gross negligence of Defendants, Plaintiffs contracted COVID-19 at the Center Facility and have experienced significant injuries, including death. *Id.*

On July 23, 2020, Plaintiffs filed their first amended petition in the 273rd Judicial District of Shelby County, Texas. The petition asserts a negligence and gross negligence claim against all Defendants, a premises liability claim against Tyson, and a wrongful death and survival claim against all Defendants by Plaintiff Clifford Bell, individually and as the personal representative for the estate of Beverly Whitsey. *Id.* at 6–9.

Tyson then removed the action to federal court asserting federal officer and federal question jurisdiction. (Doc. #1). It asserts that because Tyson was under an April 28, 2020, Executive Order to continue operations pursuant to the supervision of the federal government and pursuant to federal guidelines and directives, federal court is the proper forum for resolving the case. *Id.* at 3. Plaintiffs then filed the pending motion to remand alleging that Defendants had not met their burden to prove federal jurisdiction is proper. (Doc. #13).[1]

II. LEGAL STANDARD

Federal courts are courts of limited jurisdiction and may only hear a case when jurisdiction is both authorized by the United States Constitution and confirmed by statute. *Griffin v. Lee*, 621

[1] Although there are both corporate and individual defendants, all are represented by the same attorneys. For clarity purposes, the Court will refer to all defendants as Tyson.

F.3d 380, 388 (5th Cir. 2010). Removal to federal court is proper when the federal court would have had original jurisdiction over the action. 28 U.S.C. § 1441(a). The federal court has original federal question subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Additionally, under Section 1442(a)(1), commonly referred to as the Federal Officer Removal Statute, "[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" may remove a civil action commenced in state court "for or relating to 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." 28 U.S.C. § 1442(a)(1).

Although usually "[a]ny ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand," *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002), the federal officer removal statute must be liberally interpreted because of its broad language and unique purpose. *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 147 (2007). As with any motion to remand, the removing party bears the burden of showing that federal jurisdiction exists, and that removal was proper. *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1408 (5th Cir. 1995); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 397 (5th Cir. 1998).

III. DISCUSSION

To this Court's knowledge, there are currently three main judicial opinions that address virtually the same issue as the one in this case: *Fernandez v. Tyson Foods, Inc. et al.*, No. 20-CV-2079-LRR, 2020 WL 7867551 (N.D. Iowa Dec. 28, 2020),[2] *Fields et al. v. Brown et al.*, No. 6:20-

[2] This decision is currently on appeal before the Eighth Circuit. *Fernandez v. Tyson Foods, Inc. et al.*, No. 21-1010 (8th Cir. appeal docketed Jan. 4,2021).

CV-00475, 2021 WL 510620 (E.D. Tex. Feb. 11, 2021),[3] and *Wazelle, et al., v. Tyson Foods, Inc., et al.*, No. 2:20-CV-203-Z, 2021 WL 2637335 (N.D. Tex. June 25, 2021). *Fernandez* granted remand while *Fields* and *Wazelle* did not. For the reasons explained below, this Court agrees with *Fernandez* and Plaintiffs' motion to remand will be granted.

A. Federal Officer Jurisdiction

A defendant removing under section 1442(a)(1) must show "(1) it has asserted a colorable federal defense, (2) it is a 'person' within the meaning of the statute, (3) that has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer's directions." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020). Here, Tyson's status as a "person" is not disputed. However, elements one, three, and four are disputed.

(1) Colorable Federal Defense

To be "colorable," the asserted federal defense need not be "clearly sustainable," as section 1442 does not require a federal official or person acting under him "to 'win his case before he can have it removed.'" *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999) (internal citations omitted). Instead, if an asserted federal defense is plausible, it is colorable. *Latiolais*, 951 F.3d at 297. A defense is colorable unless it is "immaterial and made solely for the purpose of obtaining jurisdiction" or "wholly insubstantial and frivolous." *Id*.

In its notice of removal, Tyson raised two federal defenses. First, it argues that the Poultry Products Inspection Act ("PPIA") expressly preempts Plaintiffs' state-law claims. (Doc. #1, at 9). Second, it claims that "Plaintiffs' claims are also preempted by the DPA ["Defense Production

[3] The district court in *Fields* gave the plaintiffs permission to apply for an interlocutory appeal of the order, but the Fifth Circuit denied the application without stating a reason. *Fields v. Brown*, No. 21-90021 (5th Cir. June 21, 2021).

Act"] and the President's [April 28, 2020] Food Supply Chain Resources executive order and related federal directions." *Id.* at 10.

i. PPIA

After pointing out that the PPIA and the Federal Meat Inspection Act ("FMIA") have substantially identical preemption provisions, Tyson maintains that the FMIA "'sweeps widely' and 'prevents a State from imposing any additional or different—even if non-conflicting—requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations." (Doc. #1, at 9–10) (quoting *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 459–60 (2012)). Specifically, Tyson argues that "the alleged failings Plaintiff pleads are 'in addition to, or different than,' the requirements that FSIS[4] [("Food Safety and Inspection Service")] has imposed regarding employee hygiene and infectious disease—and therefore are preempted under the express terms of 21 U.S.C. § 467e." (Doc. #14, at 22). Tyson asserts that "[p]reemption applies wherever Plaintiffs seek to impose, as a matter of state law, different requirements for poultry-processing employees than those adopted by the Department of Agriculture." (Doc. #14, at 23).

The PPIA's express preemption clause (which includes a savings clause) is found at 21 U.S.C. § 467e and provides:

> Requirements within the scope of [the PPIA] with respect to premises, facilities and operations of any [meat-processing] establishment . . . which are in addition to, or different than those made under [the PPIA] may not be imposed by any State . . . .
>
> This chapter shall not preclude any State . . . from making requirement [sic] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

Thus, for a state rule to be preempted by the PPIA, it must be within the scope of the Act. "[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent.

[4] The United States Department of Agriculture ("USDA") is responsible for enforcing the PPIA. FSIS is under the direction of USDA. The parties' briefing use FSIS and USDA somewhat interchangeably.

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