

Division, Wake County, to the United States District Court for the Eastern District of North Carolina, Western Division. In support of this Notice of Removal, the Removing Defendants aver as follows:

1. On September 15, 2009, plaintiffs R. Daniel Brady, as Administrator for the separate Estates of Ali Kinani, Abraham Abed Al Mafraje and Mahde Sahab Naser Shamake; and Mohammed Hafedh Abdulrazzaq Kinani, Kalled Abraham Al Mafraje, Sahab Naser Shamake, Majid Salman Abed Al-Kareem, Nasear Hamza Latif Rahief, and Ghassan Abad Alkarem Mahmood, (collectively, “Plaintiffs”) filed a civil complaint (the “Complaint”) in the North Carolina General Court of Justice, Superior Court Division, Wake County, captioned *R. Daniel Brady et al. v. Xe Services LLC et al.*, No. 09-CV-018387.

2. Plaintiffs began serving the Removing Defendants with Summonses and copies of the Complaint beginning on September 17, 2009.² The Summonses and Complaint are all of the process, pleadings and orders served upon the Removing Defendants to date. Pursuant to 28 U.S.C. § 1446(a), copies of the Summonses and Complaint are attached hereto as **Exhibit A**.

3. The time within which the Removing Defendants must file this Notice of Removal has not yet expired. *See* 28 U.S.C. § 1446(b).

4. In the Complaint, Plaintiffs allege that Defendants are liable in tort for injuries sustained on September 16, 2007 during a firefight in a Baghdad market known as Nisur Square. (Compl. ¶ 1.) The Complaint further alleges that such injuries were inflicted by independent contractors (“ICs”), named as individual defendants in the Complaint, who were hired by certain corporate defendants in furtherance of a contract with the United States Department of State.

² Defendant Nicholas Abram Slatten has not been properly served with the Summons and Complaint, and does not waive any defense of lack of process by joining in filing this Notice of Removal.

(*Id.* ¶¶ 2, 53, 69-89.)

5. The Complaint asserts causes of action for wrongful death, negligence causing personal injury, vicarious liability for wrongful death and personal injury, direct liability for wrongful death and personal injury, negligent supervision, negligent retention, and punitive damages. (*Id.* ¶¶ 110-57.)

6. At all times relevant to the events alleged in the Complaint, Defendants were acting under and under color of the United States Department of State (the “State Department”), which entered into a contract obligating defendant United States Training Center (“USTC”) to provide security services to protect United States diplomats traveling through hostile regions of Iraq.³

7. All of the claims in the Complaint relate to Defendants’ actions under the USTC contract with the State Department. Plaintiffs’ claims accordingly are all based on - and causally connected to - acts taken under and under color of the State Department. Defendants are therefore entitled to remove this case to federal court pursuant to 28 U.S.C. § 1442(a)(1), which authorizes removal by “any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office.” This statute applies to claims arising out of a private party’s “effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior.” *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 152 (2007). Courts have consistently held that this provision authorizes removal by a federal contractor of suits based upon the contractor’s acts pursuant to the contract that assist the federal government in carrying out its duties. *Id.* at 154 (explaining that federal contractor could

³ Initially, the contract was between the State Department and Blackwater Lodge and Training Center, Inc., which subsequently changed its name to USTC.

invoke Section 1442 on the ground that, under the contract, the contractor “performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform”); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135-36 (2d Cir. 2008) (determining that a chemical manufacturer, contracted to produce Agent Orange for the federal government’s use in Vietnam, is a federal officer under Section 1442); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 396-401 (5th Cir. 1998) (same); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992) (finding a submarine manufacturer under contract with the Secretary of Navy to be a federal officer under Section 1442). *See generally Willingham v. Morgan*, 395 U.S. 402, 406 (1969) (courts should construe Section 1442 broadly, not in a “narrow or limited” manner); *Jamison v. Wiley*, 14 F.3d 222, 238-39 (4th Cir. 1994) (removal under Section 1442 is not constrained by the well-pleaded complaint rule, but is appropriate “when [the federal officer defendant] can allege a colorable federal defense to [an] action” (internal quotation marks omitted)).

8. Because all of the injuries alleged arise from conduct performed by USTC within the scope of, and subject to, the State Department contract, the Westfall Act provides Defendants, as federal employees acting within the scope of their office or employment, with the colorable federal defense of immunity from suit for claims arising from the allegations in the Complaint. *See* 28 U.S.C. §§ 2672, 2679.

9. Another colorable federal defense is the government contractor defense, which bars liability for state-law tort suits based on a government contractor’s performance of a service contract with the federal government. *See, e.g., Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1335 (11th Cir. 2003); *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 422-23 (D.S.C. 1994). USTC’s contract with the State Department and the State

Department's supervision of USTC's performance under that contract therefore preclude Plaintiffs' recovery on their claims.

10. Another colorable federal defense is the absolute immunity that exists for government contractors who exercise their delegated discretion while acting within the scope of their employment. *E.g., Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442 (4th Cir. 1996).

11. Another colorable federal defense is the political question doctrine, under which cases or controversies are non-justiciable when a contractor works under government-prescribed standards and government control that "thoroughly pervade[]" the contractor's work in a way that makes it "impossible to make any determination regarding" the contractor's alleged misconduct without bringing into question the government's judgments regarding appropriate protocols for use of force in a war zone. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, No. 08-14487, 2009 WL 1856537, at *8 (11th Cir. June 30, 2009).

12. Still another colorable federal defense rests upon the preemption doctrine, under which the exemptions from liability set forth in the Federal Tort Claims Act, and other federal principles, apply to preclude the imposition of liability on government contractors. *See Saleh v. Titan Corp.*, Nos. 08-7008, 08-7009, 2009 WL 2902081, at *5-9 (D.C. Cir. Sept. 11, 2009).

13. In addition to a statutory right to removal under Section 1442, removal is also proper under Section 1441 inasmuch as Plaintiffs' state law claims implicate the significant federal issues just discussed. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) ("[A] federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.").

14. As noted above, counsel for defendant Jeremy P. Ridgeway has informed the

undersigned that Ridgeway intends to file a separate notice of removal. Even so, removal of this action under Section 1442(a)(1) remains proper. *See Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co.*, 644 F.2d 1310, 1315 (9th Cir. 1981) (“Since the federal officer is the only one entitled to remove under § 1442, he alone can remove without other defendants joining in the petition, and the entire case is removed to the federal court.”); *Fowler v. S. Bell Tel. & Tel. Co.*, 343 F.2d 150, 152 (5th Cir. 1965) (“[I]t is settled that the filing of a petition for removal by a single federal officer removes the entire case to the federal court.”).

15. After filing this Notice of Removal with this Court, the Removing Defendants will promptly file a copy of the same with the Clerk of the Superior Court for Wake County, North Carolina. The Removing Defendants will also serve written notice of this Notice of Removal on counsel for Plaintiffs in accordance with 28 U.S.C. § 1446(d).

WHEREFORE, the Removing Defendants pray that this cause proceed in this Court as an action properly removed thereto.

This the 15th day of October, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2009, I electronically filed the foregoing NOTICE OF REMOVAL with the Clerk of the Court using the CM/ECF system and served the same on plaintiffs by U.S. Mail delivery addressed as follows:

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