

# Client Alert

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## Ninth Circuit Offers Guidance to Defendants Seeking to Establish Removal Jurisdiction

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The Supreme Court recently denied a petition for a writ of certiorari in *Leite v. Crane Co.*, 49 F.3d 1117 (9th Cir. 2014), *cert. denied*, 574 U.S. \_\_\_\_ (2014) (No. 14-119), a case in which the Ninth Circuit established the framework for resolving challenges to removal jurisdiction. The cert denial presents an opportunity to examine the Ninth Circuit's ruling and the guidance it offers to defendants seeking to successfully remove to federal court.

### FEDERAL OFFICER REMOVAL IN *LEITE*

*Leite* involved product liability claims by plaintiffs who had worked as machinists at the Pearl Harbor Naval Shipyard. The plaintiffs filed two suits against Crane Co. in state court, alleging that Crane had failed to warn them of the dangers posed by asbestos used in and around equipment supplied by Crane to the U.S. Navy.

Crane removed under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). In pertinent part, Section 1442(a)(1) authorizes the removal of a civil action against any person "acting under" a U.S. officer "for or relating to any act under color of such office." To remove under this statute, a defendant must show that (1) it is a "person" within the meaning of the statute; (2) there is a causal nexus between the plaintiff's claims and actions taken by the defendant at a federal officer's direction; and (3) it has a "colorable" federal defense. Crane alleged that it satisfied each of these requirements in light of its government contractor defense.

### MOTIONS TO REMAND ARE ANALOGOUS TO MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

After both district courts denied the plaintiffs' motions to remand, the Ninth Circuit certified the orders for interlocutory appeal under 28 U.S.C. § 1292(b). The court noted that the cases raised "several novel procedural questions" involving the framework within which a court must analyze a challenge to removal jurisdiction—particularly removal under Section 1442(a)(1).

The Ninth Circuit answered these questions by reference to the procedurally comparable context of a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). As the court pointed out, 28 U.S.C. § 1446(a), the statute governing the procedure for removal, tracks the language of Federal Rule of Civil Procedure 8(a)(1) by requiring the defendant to provide a "short and plain statement of the grounds for removal." Thus, like a plaintiff alleging subject matter jurisdiction, a defendant seeking removal must meet the pleading standards set forth in *Iqbal* and *Twombly* by alleging sufficient facts, rather than mere legal conclusions, supporting each of the elements for removal jurisdiction.

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## FACIAL VS. FACTUAL ATTACKS AGAINST REMOVAL

The *Leite* court also explained that, like a Rule 12(b)(1) motion, “a plaintiff’s motion to remand may raise either a facial attack or a factual attack on the defendant’s jurisdictional allegations.”

A facial attack accepts the truth of the defendant’s allegations but claims that they “are insufficient on their face to invoke federal jurisdiction.” A district court must resolve a facial attack as it would resolve a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6): The court must determine whether the defendant’s allegations are legally sufficient to invoke federal jurisdiction, accepting the defendant’s jurisdictional allegations as true and drawing all reasonable inferences in the defendant’s favor.

By contrast, a factual attack challenges the truth of the defendant’s factual allegations supporting removal, “usually by introducing evidence outside the pleadings.” In the face of a factual attack, the defendant must support its “jurisdictional allegations with ‘competent proof’ . . . under the same evidentiary standard that governs in the summary judgment context.” Thus, the defendant must prove by a preponderance of the evidence that it has met each requirement for removal jurisdiction. Unlike a motion for summary judgment, however, the district court may resolve factual disputes upon which the existence of jurisdiction turns (unless the jurisdictional issue is intertwined with an issue related to the merits of the plaintiff’s claims, in which case the court must leave that dispute for the trier of fact).

Applying these standards to the motions to remand in *Leite*, the court explained that the plaintiffs had raised a factual attack by challenging the truth of Crane’s jurisdictional allegations. The plaintiffs argued that Crane lacked a factual basis for the government contractor defense and that no causal nexus existed between their claims and the actions that Crane took under a federal officer. The Ninth Circuit disagreed. Relying on the affidavits submitted with Crane’s notice of removal, the court held that Crane proved by a preponderance of the evidence both requirements for federal officer removal. The court explicitly expressed no view on the merits of Crane’s claims, stating only that Crane met its evidentiary burden for purposes of defeating the motions to remand. Thus, the court affirmed the rulings of the district courts.

## WHAT *LEITE* MEANS FOR DEFENDANTS IN THE NINTH CIRCUIT

Defendants seeking to remove cases in the Ninth Circuit can now better anticipate how a district court will analyze a motion to remand. To avoid remand, defendants must not only plead facts sufficient to withstand a 12(b)(6) analysis but also be prepared to prove those allegations by a preponderance of the evidence. Notably, although the defendant in *Leite* attached its evidentiary support to the removal papers themselves, the court did not hold that all defendants must do this; *Leite* indicates that a defendant may combat a factual challenge by submitting evidence after the plaintiff moves to remand.

Beyond that broad guidance and its application to the facts in *Leite*, the Ninth Circuit’s ruling offers little insight as to how its framework will apply in specific situations. For instance, many aviation defendants have removed under the federal officer removal statute in cases implicating certification conduct by FAA designees—whether it be an individual designee employed by the organization, such as a Designated Airworthiness Representative (DAR), Designated Engineering Representative (DER), or Designated Manufacturing Inspection Representative (DMIR), or the organization itself, acting pursuant to its Organization Designation Authorization (ODA) status.

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Defendants in these cases have argued that the federal designees “acted under” a federal officer for purposes of 28 U.S.C. § 1442(a)(1). And courts have reached inconsistent results in evaluating motions to remand. In a number of cases, courts have accepted the argument that an FAA designee “acts under” a federal officer by participating in certification or approving a defendant’s products. Other courts have reached the opposite conclusion.

The Ninth Circuit has not yet addressed this issue, and *Leite* offers little insight as to how the court will view it. But *Leite* does suggest that defendants should anticipate facial, rather than factual, attacks against removal under the FAA-designee theory. *Leite* also suggests that such challenges will hinge less on the “colorable federal defense” element and more on the question of whether a DAR, DER, DMIR, or ODA organization “acts under” a federal officer or agency. Plaintiffs can point to the body of cases rejecting this basis for removal to argue that, accepting all allegations as true, the defendant cannot satisfy the “acting under” requirement as a matter of law. To align themselves with the cases accepting this theory of removal, defendants’ removal papers should include as much factual information as possible regarding the FAA’s oversight of the designee at issue. Generalities clearly will not suffice.

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