UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MODULAR DEVICES, INC.,

Plaintiff,

-against-

BROOKHAVEN SCIENCE ASSOCIATES, LLC and AEi SYSTEMS, LLC,

Defendants.

-- x

Index No.: 08 CV 3267 (LDW) (ARL)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

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MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

Defendants/Counterclaim Plaintiffs Brookhaven Science Associates, LLC ("BSA") and AEi Systems, LLC ("AEi") (together, "Defendants"), respectfully submit this memorandum of law in opposition to plaintiff Modular Devices, Inc.'s ("MDI's") Motion to remand this action to state court (the "Motion"). This Court plainly has subject matter jurisdiction over this action and this case was properly removed to this Court by BSA pursuant to 28 U.S.C. §1442(a)(1). MDI's claims against BSA are claims against a person – BSA – acting under an officer of an agency of the United States – the United States Department of Energy (the "DOE"). Moreover, BSA has a colorable federal defense, and MDI knows it: All of BSA's allegedly wrongful acts are permitted by contracts between BSA and MDI that are expressly governed by federal law. For those reasons, the Motion must be denied.[1]

This action involves a dispute over a chain of related agreements. The fundamental agreement was a contract between CERN (the European Organization for Nuclear Research) and the DOE and National Science Foundation ("NSF") in which the DOE/NSF agreed to contribute to the construction of the ATLAS Detector for the Large Hadron Collider ("LHC") at CERN. That agreement was supported by a letter from DOE and NSF requesting that Brookhaven National Laboratory ("BNL") provide management oversight for the ATLAS Detector project and regularly report directly to the DOE/NSF Joint Oversight Group to ensure that the project was being soundly managed.

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[1] Article 22 of the General Terms and Conditions of each of the contracts provides that "the parties agree that the Federal common law of government contracts will govern the construction and interpretation of this Agreement and all claims arising under or related to this Agreement or work performed under this Agreement or claims of breach of this Agreement, regardless of the forum in which any party to this Agreement brings action."

In the alternative, this Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 and this case may be removed to this Court by Defendants pursuant to 28 U.S.C. §1441, as Brookhaven National Laboratory is a federal enclave

In connection with the DOE's responsibilities to CERN, several other agreements were entered: (i) DOE's contract with BSA to operate BNL, which is governed by federal law; (ii) BSA's contract with MDI to deliver Low Voltage Power Supply ("LVPS") units for shipment to CERN, which is expressly governed by federal law; and (iii) BSA's contracts with Ensil Corporation ("Ensil"), AEi and Algen Design Services, Inc. ("Algen") to fulfill the DOE's obligation to deliver LVPS units to CERN when MDI breached its obligation to timely deliver to BSA properly functioning LVPS units.

All of the conduct challenged by MDI was all undertaken by BSA to fulfill its obligation to DOE to deliver LVPS units to CERN. Under the contracts between BSA and MDI, "Federal common law of government contracts will govern the construction and interpretation of this Agreement and **all claims arising under or related to** this Agreement or work performed under this Agreement or claims of breach of this Agreement." And BSA's challenged conduct did not violate any of MDI's rights. Rather, BSA had the right to take the steps it did under its contracts with MDI. As a result, as we shall more fully show, the Motion must be denied.

RELEVANT BACKGROUND

Brookhaven National Laboratory

As demonstrated in the accompanying declarations of Howard Gordon (the "Gordon Dec.") and Michael Goldman (the "Goldman Dec."), both dated December 9, 2008, the site of BNL was designated the Camp Upton Military Reservation, which was acquired by the United States in 1919 and 1920 through a series of purchases and condemnation actions. Goldman Dec. ¶ 3. On April 19, 1933, the United States Attorney General executed a Certification that the United States acquired possession under a clear and complete title of most of the current BNL site in Upton, New York. Goldman Dec. ¶ 4. By a Deed of Cession, dated July 17, 1933, the

United States government obtained exclusive jurisdiction over the BNL site from the State of New York and New York State ceded all jurisdiction over the site to the federal government, except an expressed reservation for service of civil or criminal process. As a result, a federal enclave was created. Goldman Dec. ¶ 5. A true and correct copy of the 1933 Deed of Cession is annexed to the Goldman Dec. as Exhibit A.

In July 1946, the lands occupied by Camp Upton were transferred by the United States War Department to the Manhattan District of Engineers for the United States Army. Goldman Dec. ¶ 6. By Executive Order dated December 31, 1946, the Secretary of War transferred the BNL property to the Atomic Energy Commission ("AEC"). Goldman Dec. ¶ 7. In 1946, BNL, a research facility owned by the United States, was created and took occupation of the federal enclave in Upton, New York. Goldman Dec. ¶ 8. The AEC was abolished in 1974, and all of the BNL land was subsequently turned over to the Energy Research and Development Administration. Goldman Dec. ¶ 9. In 1977, the land was transferred to the DOE by the Department of Energy Organization Act, 42 U.S.C. § 7151. *Id.* Between 1947 and February 28, 1998, Associated Universities, Inc. ("AUI") operated BNL under a contract with the DOE. Goldman Dec. ¶ 10.

Since March 1, 1998, BSA has operated BNL under a contract with the DOE, as more fully described below. Goldman Dec. ¶ 11. BSA contractually is subject to the monitoring and supervision of the DOE in operating BNL. Goldman Dec. ¶ 12. The property upon which BNL is located, the buildings situated on BNL property and all of the personal property and equipment used at BNL are owned by the DOE. Goldman Dec. ¶ 13. Almost all of the money required to operate BNL comes from the DOE. Goldman Dec. ¶ 14. Congress has never authorized any regulation of BNL relating to the causes of action set forth in the Complaint.

Goldman Dec. ¶ 15. BNL remains completely within federal jurisdiction with the sole exception of service of civil or criminal process. Goldman Dec. ¶ 5.

CERN and BNL's Role with the ATLAS Detector

CERN is the world's largest particle physics laboratory. CERN's main function is to provide the particle accelerators and other infrastructure needed for high-energy physics research. The ATLAS Detector is a large experimental apparatus being constructed at the LHC at CERN. (*See* http://public.web.cern.ch/public/en/LHC/ATLAS-en.html). On December 8, 1997, the **DOE** and NSF entered into an International Co-operation Agreement with CERN in which the **United States agreed** to contribute to the construction of the ATLAS Detector for the LHC at CERN. Gordon Dec. ¶ 2; Goldman Dec. ¶ 16. A true and correct copy of certain portions of the DOE/CERN Agreement is annexed to the Goldman Dec. as Exhibit B. Furthermore, in preparation for that agreement, a letter, dated April 21, 1997 (the "April Letter"), was sent on behalf of the DOE and the NSF, requesting that BNL provide management oversight for the ATLAS Detector project which would report directly to the DOE/NSF Joint Oversight Group regularly to ensure that the project is being soundly managed. Gordon Dec. ¶ 3; Goldman Dec. 17. A true and correct copy of the April Letter is annexed to the Goldman Dec. as Exhibit C.

In 1998, BSA entered into a contract with the DOE (Contract No. DE-AC02-98CE10886)(the "DOE Contract"), pursuant to which, among many other things, (i) BSA would operate BNL; (ii) BNL would serve as the United States host laboratory for the 43 United States institutions collaborating on the ATLAS Detector at the LHC; (iii) BNL was to design, manufacture and ship a portion of the ATLAS Detector to CERN, including LVPS units; (iv) BNL was designated one of the DOE Office of Science multi-program laboratories and a

Federally Funded Research and Development Center pursuant to the Federal Acquisition Regulation Part 35; and (v) BNL would manage the United States ATLAS Operations Program. Gordon Dec. ¶ 4; Goldman Dec. ¶ 18. A true and correct copy of certain portions of the DOE Contract is annexed to the Goldman Dec. as Exhibit D.

As noted above, as part of the work it performs in connection with the construction of the ATLAS Detector, BSA provides LVPS units to CERN. Gordon Dec. ¶ 4. The LVPS units must be highly reliable, capable of withstanding a moderate radiation environment, and are critical to measurement of the energy and the position of electromagnetic particles produced in the ATLAS Detector. BNL played multiple roles in the construction of the ATLAS Detector, ranging from construction and project management to data storage and distribution, fulfilling certain of the DOE's responsibilities to CERN. If BNL had not done so, DOE would have had to do so directly or find others to do so for it. Gordon Dec. ¶ 5; Goldman Dec. 19.

The RFQ

Prior to 2002, BSA decided to contract out the development and production of the LVPS units to be installed in the ATLAS Detector. In connection therewith, on or about September 10, 2002, BSA issued Request for Quotation No. 66116 (the "RFQ") soliciting bids for the LVPS units. Gordon Dec. ¶ 6. A true and correct copy of the RFQ is annexed to the Gordon Dec. as Exhibit D. Section 2.1 of the RFQ, *inter alia*, outlined the scope of the work to be performed as follows:

> "The program will consist of two phases. Phase I will be the design, development and construction of prototypes. Phase [II] will be the manufacturing of production units including first articles. Phase I and [P]hase II items are to meet the requirements of the Radiation Power Supply Work Statement and Specifications, Attachment B.
>
> Initially, a contract will be awarded for Phase I with an option

> clause indicating that BNL has the right to purchase Phase II at the negotiated pricing of this RFQ. The option will be valid up until two (2) months after delivery of prototypes that meet specifications as verified by BNL." Gordon Dec., Ex. D.

Section 5.0 of the RFQ informed potential bidders that "[t]he resultant firm fixed price purchase order shall be subject to the terms and conditions of Attachment A. For a small business[,] Intellectual property provisions PSBNP-1287 shall apply... ." BSA annexed to the RFQ the referenced terms and conditions and the intellectual property provisions. (*Id.*) On or about October 7, 2002, MDI submitted its bid in response to the RFQ. On November 19, 2002, BSA accepted MDI's bid and issued Purchase Order 66116 (the "66116 Contract"). Gordon Dec. ¶ 6. A true and correct copy of the initial Contract No. 66116 is annexed to the Goldman Dec. as Exhibit E.

The 66116 Contract

MDI admits that the 66116 Contract was directly related to the DOE Contract and that MDI agreed, *inter alia*, "to create two prototypes of the power supply **for the DOE Contract**." Complaint ¶ 13 (emphasis added). Gordon Dec. ¶ 6. In the 66116 Contract, BSA "reserve[d] the right to purchase ... 2 First Article units at a maximum firm fixed price ... and 68 Production Units at a maximum firm fixed price ...." Gordon Dec. ¶ 6; Goldman Dec. ¶ 20. Furthermore, the 66116 Contract is explicitly governed by federal common law. The 66116 Contract also provided that "Attachment A, regarding the General Terms and Conditions ["Attachment A"], and Attachment B, regarding Intellectual Property Provisions For A Contract with a Small Business ... ["Attachment B"] with the exception of clauses 1, 2, and 4 are attached hereto and shall apply to this order."

Attachment A sets forth BSA's Terms and Conditions For Non-Commercial Items.

- Article 10 of Attachment A provides that "[BNL's] acceptance of the goods and services delivered hereunder and its subsequent use thereof shall not constitute a waiver of any improper materials or workmanship, or [BNL's] rights and remedies with respect to them. [BNL's] acceptance and its subsequent use of goods or services delivered after the agreed upon delivery date shall not constitute a waiver by [BNL] of any rights arising from said late delivery."

- Article 15 of Attachment A provides in pertinent part: "[MDI] warrants that the material, supplies and/or equipment delivered hereunder … shall accord in every respect with the description, specifications, drawings, and /or samples elsewhere identified in this Agreement" and that "all goods delivered hereunder shall be free from defects in design …, material and workmanship."

- As noted above, Article 22 of Attachment provides in pertinent part that "the parties agree that the Federal common law of government contracts will govern the construction and interpretation of this Agreement and all claims arising under or related to this Agreement or work performed under this Agreement or claims of breach of this Agreement, regardless of the forum in which any party to this Agreement brings action."

Attachment B sets forth the intellectual property provisions applicable to the 66116 Contract. Clause 6 of Attachment B, expressly grants to BSA "**<u>unlimited rights</u>**" in "**<u>data first produced in the performance of the contract</u>**." The schematics, layout/artwork, parts list or assembly specifications and procedures are covered by both the definition of "data" and "form, fit and function data," as defined therein. Unlimited rights included the right to "to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so." Gordon Dec. ¶ 7. Attachment A and Attachment B are material terms and conditions of the 66116 Contract.

<u>MDI's Failure to Deliver Acceptable Prototypes</u>

In November 2003 (and only after significant prodding from BSA), MDI delivered the first prototype and in January 2004, MDI delivered the second prototype. Gordon Dec. ¶ 8. The prototypes were fraught with numerous technical and performance problems, which are fully

described in the Gordon Dec. These problems required the prototypes to be repeatedly reworked in order to achieve an acceptable level of performance, resulting in a delay in their delivery to BSA and, in turn, to CERN. *Id.*

Although BSA was behind schedule as a result of MDI's failures, BSA decided that it was best **not** to terminate the 66116 Contract or otherwise declare MDI to be in breach. Gordon Dec. ¶ 9. Instead, BSA was determined to work with MDI to help MDI correct MDI's deficiencies and provide MDI with the opportunity to produce the LVPS units. Gordon Dec. ¶ 9. BSA did that because of the additional delay that would have resulted from trying to find a new contractor. Gordon Dec. ¶ 8. Thus, on April 7, 2004, BSA issued Revision 4 to the 66116 Contract ("Revision 4") and exercised its option to purchase 70 LVPS units from MDI. Gordon Dec. ¶ 10. Under Revision 4, MDI was obligated to produce 70 power supply units. *Id.* A true and correct copy of Revision 4 is annexed to the Gordon Dec. as Exhibit A

The 91308 Contract

On or about September 20, 2004, BSA simultaneously issued Revision 6 to the 66116 Contract ("Revision 6") and Purchase Order 91308 (the "91308 Contract") to accommodate MDI's request for milestone payments. Gordon Dec. ¶ 11. A true and correct copy of Revision 6 is annexed to the Gordon Declaration as Exhibit B and a true and correct copy of the Contract No. 91308 is annexed the Gordon Declaration as Exhibit C. The 91308 Contract did not supplant or otherwise supersede the 66116 Contract. Gordon Dec. ¶ 12. Indeed, Revision 6 expressly provides that the issuance of the 91308 Contract "is being done **for accounting purposes** to enable the Option that was exercised to receive milestone payments." *Id.* (emphasis added). Moreover, Revision 6 expressly provides that: "[e]xcept as modified herein **all other terms and conditions remain unchanged**" (emphasis added). *Id.* Of equal importance, the

91308 Contract expressly provides that "**All Terms and Conditions** and Milestone Payment Schedule **from P.O. 66116 apply to this order**" (emphasis added). *Id.* Accordingly, the application of federal common law and the provisions of Attachment A and Attachment B were fully applicable to the 91308 Contract. *Id.*

MDI's Breach of the 91308 Contract

On March 15, 2005, MDI delivered the First Articles to BSA and BSA immediately discovered problems with them. Gordon Dec. ¶ 13. Those problems are detailed in the Gordon Dec. Again, rather than terminating the 91308 Contract or declaring a breach, BSA afforded MDI an opportunity to remedy the problems. Gordon Dec. ¶ 14. Over the next four months, the Production Units continued to fail. Gordon Dec. ¶ 15. Those problems also are detailed in the Gordon Dec. In an attempt to remedy these failures, in July 2005, MDI chose to replace all the input capacitors of all existing and future Production Units with a different component and began delivering the retrofitted units in August 2005. Gordon Dec. ¶ 16. These retrofitted Production Units had continuing severe problems as well, including, but not limited to, inductors breaking, de-soldering, and significant thermal management issues. *Id.* These problems were later found to exist in both the First Articles and all Production Units. *Id.*

As a result of the continued failures, on December 17, 2005, BSA afforded MDI an opportunity to conduct a second major retrofit operation. Gordon Dec. ¶ 17. In order to accomplish this, MDI determined to replace the output inductors, agreed to change washers for the output return current and BSA designed an internal air-cooling manifold to spread heat and keep components from overheating. *Id.* MDI was informed about these manifolds at all stages from planning to implementation. *Id.* Even with these changes, from January through August 2006, the Production Units with the implemented changes continued to fail at an alarmingly high

rate. Gordon Dec. ¶ 18. By this time, MDI's inability to produce functioning Production Units caused significant delays in construction of the ATLAS Detector. *Id.*

Because MDI delivered many unreliable Production Units, on August 11, 2006, BSA asked MDI to conduct a formal failure analysis to determine the reason for the various failures. Gordon Dec. ¶ 19. Several weeks later, MDI delivered its failure analysis to BSA in which it unbelievably (and wrongfully) attributed the majority of the failures to employees of BSA. Gordon Dec. ¶ 20.

In letters dated October 10, 11 and 12, and November 29, 2006, BSA requested that MDI provide it with certain intellectual property, **as required by Clause 6 of Attachment B of the contracts**, in order to conduct BSA's own analyses. Gordon Dec. ¶ 21. (emphasis added). Notwithstanding its contractual obligation to provide BSA with the requested intellectual property, MDI refused to do so. Gordon Dec. ¶ 21. After deciding it could no longer rely on the information provided by MDI (or rely on MDI to deliver functioning Production Units) and determined to fulfill its obligations to the DOE related to the ATLAS Detector, BSA decided to perform its own reverse engineering and failure analysis, a process in which MDI refused to participate. Gordon Dec. ¶ 22. MDI's failure to provide the intellectual property resulted in even further delays in (i) identifying and resolving the problems with Production Units, and (ii) the construction of the ATLAS Detector. Gordon Dec. ¶ 23.

The Problems Are Identified and Remedied by Third Parties

In December 2006, BSA, at significant cost, retained Ensil to reverse engineer the Production Units and create schematics and a bill of materials and AEi to perform a circuit analysis in order to understand the nature of the failures. Gordon Dec. ¶ 24. BSA and AEi identified, *inter alia*, (i) numerous problems with MDI's design of, and its choice of

components in, the Production Units; (ii) the substandard workmanship of MDI; and (iii) poor quality control standards employed by MDI, as contributing factors to the catastrophic failures of the Production Units. Gordon Dec. ¶ 25. The MDI Production Units failed due to mechanical, thermal and circuit design flaws and selection of inadequate components. Gordon Dec. ¶ 26.

1. More specifically, and by way of example only, (i) excess heat caused burning of the printed circuit board ("PCB"); (ii) components were operated outside of manufacturers specifications; (iii) module current sharing circuitry was improperly designed and did not operate properly; (iv) shorts occurred between input, output and grounds; and (v) there was poor electrical and mechanical contact between components and the printed circuit board. *Id.* The most significant design flaw was poor thermal management. Gordon Dec. ¶ 27. This resulted from MDI's insufficient analysis of local power dissipation on the modules, inadequate design of the thermal interfaces, poor current sharing implementation, and the poor manufacturing and assembly practices with respect to thermal issues. *Id.* The situation was aggravated by poorly engineered mechanics of the modules, the fact that power losses in high current paths were not taken into account and some components were operated beyond manufacturer's specifications. *Id.* Similarly, many aspects of module assembly and module integration into the LVPS unit were inadequate including, but not limited to, the following: (a) modules were attached to the base-plate in a manner which made ineffective thermal contact resulting in poor heat conduction between heat producing components in the module and the cold plate in the LVPS units; (b) the top PCB was bent significantly which contributing to poor thermal conductivity and other failures in the module; (c) particularly poor design and implementation was found in the mechanical and electrical contact between

the top PCB and the current return posts. This resulted in very high temperatures at this contact; (d) the poor quality of the pin solder joints and the inadequate pin/socket alignment resulted in power losses on the output terminals and again elevated temperatures; (e) the current rating of the sockets was significantly lower than the actual operating currents; and (f) input power cable connectors that MDI selected were unreliable resulting in intermittent connections. (g) Summing diodes were often improperly soldered to the top PCB board contributing to power losses and module failures; (h) Also, the choice of many components and component values which defined the dynamics of the LVPS units was inadequate. Approximately 30% of the components had to be upgraded to correct the circuitry and reduce the chances of failure. Gordon Dec. ¶ 28.

BSA and AEi determined that the technical problems with the First Articles and Production Units were of such a serious and fundamental nature that they could not be used in the ATLAS Detector without major changes. Gordon Dec. ¶ 29. As a result, BSA decided to retrofit the First Articles and Production Units to achieve acceptable levels of safety and reliability. Gordon Dec. ¶ 30. In January 2007, BSA issued a Request for Proposals to completely retrofit the First Articles and Production Units. *Id.* In February 2007, BSA, again at significant cost, retained Algen to retrofit the First Articles and Production Units so that they could be provided to CERN. Gordon Dec. ¶ 31. Through its collaboration with BSA and AEi, Algen successfully retrofitted 66 of the units and thus helped satisfy the DOE's obligations to CERN. Gordon Dec. ¶ 32.

BSA entered into two non-disclosure agreements ("NDAs") with MDI in March 2004 and November 2005. Gordon Dec. ¶ 33. Those NDAs did **not** modify BSA's rights under Contract No. 66116 and Contract No. 91308. *Id.* (emphasis added). Rather, the NDAs merely

protected MDI in the event MDI disclosed information to BSA which was not "data first produced in the performance of the contracts." *Id.* No such data was in fact disclosed. *Id.*

At bottom, all of the actions by BSA alleged to have violated the NDAs and/or MDI's other alleged rights were taken by BSA in connection with the performance of its obligations to deliver LVPS units to CERN on behalf of the DOE and as permitted by BSA's contracts with MDI. Gordon Dec. ¶ 34.

Moreover, throughout BSA's involvement with MDI relating to BSA's role in fulfilling the DOE's contractual obligations with CERN, BSA has been subject to the monitoring and supervision of the DOE. Gordon Dec. ¶ 35. Indeed, such monitoring was specifically contemplated by the DOE Contract, including, inter alia:

- "The Contractor shall have a DOE-approved purchasing system to provide purchasing support and subcontract administration. The Contractor shall, when directed by DOE and may, but only when authorized by DOE, enter into subcontracts for the performance of any part of the work under this Contract." *C-20.
- "The Contractor's short- and long-range plans and activities for treatment, storage and disposal must be coordinated and integrates with DOE's national waste management program and the DOE, EM, and CH Strategic Plans." *C-22.
- "DOE shall have authority to: (i) exercise appropriate general control over the contract work; (i) have full access to information concerning performance of such work; (iii) conduct periodic and other appraisals of programmatic, project and managerial objectives and milestones and consult with the Contractor regarding these and other matters of mutual interest; and (iv) in accordance with other provisions of the contract, have the authority to review and approve major policies and procedures affecting administrative and operating areas." *C-23.
- The DOE reserves the right to direct the Contractor to assign to the DOE, or another contractor, any subcontract awarded under this contract." *H-7.
- The Contractor shall comply with all applicable regulations and instructions of DOE relative to the control of and accounting for source and special nuclear material." *H-11.
- "Specific performance work statements, performance standards (measures applied to results/outputs) acceptable quality levels (permissible deviations from performance expectations), and related incentives shall be established annually, or at such intervals determined by the DOE to be appropriate." at *C-5.

- "In performance under this contract, the Contractor shall be evaluated within ... general performance goals and expectations ..." (proceeds to list some general goals and expectations by field) at *C-5
- "The results-oriented performance objectives of this contract are stated in the Performance Evaluation and Measurement Plan (Appendix B), and/or in the Work Authorization Directives issued annually in accordance with the special clause entitled, "Long-Range Planning, Program Development and Budgetary Administration. ... The Plan shall be actively maintained and annually updated in accordance with strategic planning instructions issued by the DOE Site Office." at *C-7.
- "The Contractor shall develop and implement a Laboratory assurance process, acceptable to the Contracting Officer, which provides reasonable assurance that the objectives of the Contractor's management systems are being accomplished and that the systems and controls will be effective and efficient." at *C-7
- "The Contractor shall conduct an on-going self-assessment process that continually samples and validates actual program practice with prescribed DOE and Laboratory policies, standards and procedures." *C-22.
- The Government has the right to inspect and evaluate the work performed or being performed under the contract, and the premises where the work is being performed, at all reasonable times ...." *E-1.
- DOE approval of the program proposals and budget estimates will be reflected in work authorizations and financial plans developed, issued and revised in accordance with the procedures agreed upon ...." *H-2.
- The Contractor shall provide periodic updates, as requested by the DOE, on the performance against the Appendix B. The Contractor shall provide a formal status briefing at mid-year and year-end, and a formal self-evaluation report to the DOE at year-end." *H-12.

In addition to the general contractual limitations and supervision in the DOE Contract, BSA has specifically been required to produce – and has produced – monthly reports on its work to the DOE and had regular in-person reviews with the DOE regarding the various parts of the ATLAS project, including, but not limited to, the LVPS units. Gordon Dec. ¶ 35.

ARGUMENT

In its Motion, MDI attacks each of Defendants' bases for removal of this case. As set forth more fully below, each of these challenges is without merit and this case must remain in federal court.

A. REMOVAL WAS PROPER BECAUSE THIS IS A SUIT AGAINST A PERSON ACTING UNDER AN OFFICER OF AN AGENCY OF THE UNITED STATES

As Defendants demonstrated in their Notice of Removal, removal to federal court is proper in this case, pursuant to 28 U.S.C. § 1442(a)(1), because this suit is against a person – a BSA – acting under an officer or an agency of the United States – DOE – for an act under color of such office. This Court has held that federal jurisdiction exists if a private entity defendant seeking removal can show: "(1) that they are persons within the meaning of the statute, who acted under a federal officer; (2) that they performed the acts for which they are sued under color of federal office and (3) that they raise a colorable federal defense." *Depascale v. Sylvania Elec. Products, Inc.*, 2008 WL 4773404, at *3 (E.D.N.Y. Oct. 30, 2008)(Wexler, J.)(*citing Jefferson County v. Acker*, 527 U.S. 423, 431, 119 S.Ct. 2069, 144 L.Ed.2d 408 (1999); *Mesa v. California*, 489 U.S. 121, 124-25, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135 (2d Cir. 2008)). Each of those elements is plainly met here.

This Court also has explained that the "Supreme Court has held that the federal officer removal statute is to be broadly interpreted and liberally construed." *Depascale*, 2008 WL 4773404, at *3 (*quoting Watson v. Philip Morris Cos., Inc.*, --- U.S. ----, 127 S.Ct. 2301, 2304-05, 168 L.Ed.2d 42 (2007)); *see Pantalone v. Aurora Pump Co.*, 576 F.Supp.2d 325, 329 (D.Conn. 2008).[2] What is more, courts must "construe [§1442(a)(1)] broadly and apply the … test above liberally … despite the fact that defendants generally bear the burden in establishing the propriety of removal." *Reiser v. Fitzmaurice*, 1996 WL 54326, at *2 (S.D.N.Y. Feb. 8, 1996); *See Isaacson*, 517 F.3d, at 136 (*citing Watson*, 127 S.Ct. at 2304-05).

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[2] The "strict construction" on which MDI relies has only been applied where "the removing party cannot establish its right to removal by competent proof." *L&L Painting Co., Inc. v. Odyssey Contracting Corp.*, 2008 WL 2856475, at *1 (S.D.N.Y. July 22, 2008)(*citing United Food & Commercial Workers Union, Local 919 v. Centermark Props. Meriden Square*, 30 F.3d 298, 301 (2d Cir. 1994)). As set forth more fully herein, BSA has provided "competent proof" in support of its right of removal.

Furthermore, it is well settled that the "Supreme Court has advised that the policy underlying removal by federal officers 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)' … reason[ing] that '[f]ederal jurisdiction rest[ed] on a federal interest in the matter, the very basic interest in the enforcement of federal law through federal officials.'" *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 364 F.Supp.2d 329, 335 (S.D.N.Y. 2004)(*citing Willingham v. Morgan*, 395 U.S. 402, 406-07, 89 S.Ct. 1813 (1969)). Therefore, although it is admittedly Defendants' burden to establish the appropriateness of removal, such burden is tempered by the latitude with which courts have applied it, favoring having federal courts rule on federal issues, as "[t]he right to removal is absolute when a state court action is for an act done under color of office …" *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 364 F.Supp.2d, at 335.

1. MDI Does Not Dispute that BSA is a "Person" Within the Meaning of the Statute

As MDI concedes and the Second Circuit has consistently held, "corporations are 'persons' within the meaning of the removal statute." *Depascale*, 2008 WL 4773404, at *3 (*citing In re Methyl Tertiary Butyl Esther Prods. Liab. Litig.*, 488 F.3d 112, 124 (2d Cir. 2007)); *See Isaacson*, 517 F.3d at 136. As such, the first prong of the test is uncontested and Defendants are undeniably "persons" within the meaning of the removal statute.[3]

2. Defendants Have Raised a Colorable Federal Defense

Defendants have raised a colorable – indeed substantial – federal defense. "The defense must be based on federal law and arise out of the defendant's official duties." *Depascale*, 2008 WL 4773404, at *4 (*citing Isaacson*, 517 F.3d, at 138). Various forms of evidence can be used to support such a showing. In fact, as is the case here, "[a]dequately supported affidavits are

sufficient to establish a colorable federal defense for the purpose of establishing federal removal jurisdiction." *Depascale*, 2008 WL 4773404, at *4 (*citing Viscosi v. American Optical Corp.*, 2008 WL 4426884, at *4 (D.Conn. Sep. 29, 2008)). The standard for establishing this showing is similarly lenient: "To sustain federal jurisdiction, the contractor need not show that the federal defense asserted will necessarily succeed, only that a colorable claim of the defense is set forth." *Depascale*, 2008 WL 4773404, at *4

Further, courts have repeatedly held that all meaningful determinations related to a "colorable federal defense" should be left for trial in a federal court. "Courts have imposed few limitations on what qualifies as a colorable federal defense. At its core, the defense prong requires that the defendant raise a claim that is 'defensive' and 'based in federal law.'" *Isaacson*, 517 F.3d, at 138 (*citing Mesa*, 489 U.S. at 129-30); *see In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 364 F.Supp.2d, at 333-35 (colorable federal defense requirement "is broadly construed; a defense need only be colorable, not clearly sustainable.... At the very least, [the federal officer removal statute] is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law.... In fact, one of the most important reasons for removal is to have the validity of the defense ... tried in a federal court" (*quoting Willingham*, 395 U.S. at 406-07)).

Here, the "colorable federal defense" set forth by Defendants is clearly based on federal law and just as clearly arises out of BSA's official duties. As the Goldman Dec. and the Gordon Dec. and the exhibits annexed thereto demonstrate, BSA's defense in this action is that it was **permitted to take all of the actions challenged in this case under the contracts between BSA and MDI, and those contracts are expressly governed by federal law**. The DOE Contract

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[3] Although BSA is an LLC, and not a corporation, MDI does not contest that BSA is a person under the removal statute.