CITY AND COUNTY OF SAN FRANCISCO
DENNIS J. HERRERA, State Bar #139669
City Attorney
RONALD P. FLYNN, State Bar #184186
Chief Deputy City Attorney
YVONNE R. MERÉ, State Bar #173594
Chief of Complex and Affirmative Litigation
ROBB W. KAPLA, State Bar #238896
Deputy City Attorney
MATTHEW D. GOLDBERG, State Bar #240776
Deputy City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4602
Telephone: (415) 554-4748
Facsimile: (415) 554-4715
Email: robb.kapla@sfgov.org
Attorneys for The People of the State of California

CITY OF OAKLAND
BARBARA J. PARKER, State Bar #069722
City Attorney
MARIA BEE, State Bar #167716
Special Counsel
ERIN BERNSTEIN, State Bar #231539
Senior Deputy City Attorney
One Frank H. Ogawa Plaza, 6th Floor
Oakland, California
Tel.: (510) 238-3601
Fax: (510) 238-6500
Email: ebernstein@oaklandcityattorney.org
Attorneys for The People of the State of California

[*Additional Counsel Listed on Signature Page*]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

The COUNTY OF SAN MATEO, individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

CHEVRON CORP.; CHEVRON U.S.A., INC.; EXXONMOBIL CORP.; BP P.L.C.; BP AMERICA, INC.; ROYAL DUTCH SHELL PLC; SHELL OIL PRODUCTS COMPANY LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PEABODY ENERGY CORP.; TOTAL E&P USA INC.; TOTAL SPECIALTIES USA INC.; ARCH COAL, INC.; ENI S.p.A.; ENI OIL & GAS INC.; RIO TINTO PLC; RIO TINTO LTD.; RIO TINTO ENERGY AMERICA INC.; RIO TINTO MINERALS, INC.; RIO TINTO SERVICES INC.; STATOIL ASA; ANADARKO PETROLEUM CORP.; OCCIDENTAL PETROLEUM CORP.; OCCIDENTAL CHEMICAL CORP.; REPSOL S.A.; REPSOL ENERGY NORTH AMERICA CORP.; REPSOL TRADING USA CORP.; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM

Case No.: 3:17-cv-04929-VC

JOINT RESPONSE IN OPPOSITION TO ADMINISTRATIVE MOTION TO RELATE CASES

CORP.; HESS CORP.; DEVON ENERGY CORP.; DEVON ENERGY PRODUCTION COMPANY, L.P.; ENCANA CORP.; APACHE CORP.; and DOES 1 through 100, inclusive,

Defendants.

I. INTRODUCTION

Plaintiff the People of the State of California ("the People"), by and through San Francisco City Attorney Dennis J. Herrera and Oakland City Attorney Barbara J. Parker, oppose Defendants' Administrative Motion to Relate Cases. ECF Dkt. No. 170. Defendants seek to relate two cases currently pending in Judge Alsup's Court – Case Nos. 3:17-cv-06012-WHA ("the San Francisco action") and 3:17-cv-06011-WHA ("the Oakland action") – with three distinct cases currently pending in this Court – Case Nos. 3:17-cv-04929, 3:17-cv-04934, and 3:17-cv-04935 (collectively, "the San Mateo actions"). But the San Francisco and Oakland actions are not related to the San Mateo actions under Civil Local Rule 3-12(a).

II. SUMMARY OF ARGUMENT

Both the San Francisco and Oakland actions involve a single plaintiff, a single cause of action, and five defendants. By contrast, each of the San Mateo actions is brought on behalf of multiple plaintiffs, and each involves eight causes of action and at least 37 defendants. Because cases are related only if they "concern substantially the same parties, property, transaction or event," Civ. L.R. 3-12(a)(1), the San Francisco and Oakland actions are not related to the San Mateo actions.

Nor are the cases related under Civil Local Rule 3-12(a)(2). There are substantial differences between the parties and claims, and thus maintaining the cases as unrelated would not result in "an unduly burdensome duplication of labor and expense or conflicting results." Indeed, the defendants' notices of removal in the two sets of cases materially differ based upon the differing legal theories set forth in the two sets of complaints. Relating all of the actions would create an unwieldy and loosely amalgamated set of cases; they would more easily be resolved in two separate parts than as a disjointed whole. The People would be prejudiced, moreover, if the straightforward legal and factual issues presented in the San Francisco and Oakland actions were entangled with the vastly more complicated legal and factual issues raised in the San Mateo actions. The People respectfully oppose Defendants' motion to relate cases.

III. STATEMENT OF FACTS

On July 17, 2017, San Mateo County, Marin County, and the City of Imperial Beach all filed separate lawsuits in California Superior Court against the same 37 defendants and 100 unnamed

Does. *See, e.g.*, ECF Dkt. No. 1-2. Each of those 100-page complaints alleged the same eight causes of action. After being removed to this District on August 24, the parties to the San Mateo actions agreed to relate those cases in this Court. ECF Dkt. Nos. 47, 78.

On September 19, San Francisco City Attorney Dennis J. Herrera filed the San Francisco action, and Oakland City Attorney Barbara J. Parker filed the Oakland action, in California Superior Court. Case No. 3:17-cv-06012-WHA, ECF Dkt. No. 1-2; Case No. 3:17-cv-06011-WHA, ECF Dkt. No. 1-2. The San Francisco and Oakland actions each named five defendants and stated a single cause of action under California state law; both actions seek to abate the public nuisance of global warming on behalf of the People.[1] On October 20, Defendants removed both actions to this District. *Id.* The San Francisco and Oakland actions were then related in Judge Alsup's court. Case No. 3:17-cv-06011-WHA, ECF Dkt. No. 32. Defendants then moved to relate the San Francisco and Oakland actions to the San Mateo actions. ECF Dkt. No. 170.

IV. ARGUMENT

A. The San Mateo Actions Involve Many Different Parties and Legal Claims.

The San Francisco and Oakland actions do not involve "substantially the same parties, property, transaction or event" as the San Mateo actions. *See* Civ. L.R. 3-12(a)(1).

First, the San Francisco and Oakland actions are not related to the San Mateo actions under Civil Local Rule 3-12(a) merely because there is some overlap between parties. *See Adobe Sys. Inc. v. A&S Elecs., Inc.*, 2016 WL 9105173, at *3 (N.D. Cal. Oct. 13, 2016); *Ortiz v. CVS Caremark Corp.*, 2013 WL 12175002, at *2 (N.D. Cal. Oct. 15, 2013); *Hodges v. Akeena Solar, Inc.*, 2010 WL 2756536, at *1 (N.D. Cal. July 9, 2010). The San Mateo actions involve at least <u>*thirty-two*</u> defendants that are not parties to the San Francisco and Oakland actions. The substantial difference in the defendants means there will be numerous unique legal issues in the San Mateo actions that are not presented in the San Francisco and Oakland actions; in fact, there already are.[2] The San Mateo

[1] Defendants incorrectly assert that the San Francisco and Oakland actions "concede that no defendant violated any law, rule, statute, or regulation." Defs.' Mot. 5. In fact, both allege violation of California public nuisance statutes. Case No. 3:17-cv-06012-WHA, ECF Dkt. No. 1-2, at ¶ 95; Case No. 3:17-cv-06011-WHA, ECF Dkt. No. 1-2, at ¶ 94.

[2] *See In re Peabody Energy Corp.*, No. 16-42529 (Bankr. E.D. Mo. Oct. 24, 2017) (enjoining San Mateo plaintiffs from pursuing case against defendant); *In re Arch Coal, Inc.*, No. 16-40120 (Bankr. E.D. Mo.) (similar, motion pending).

actions also involve three separate plaintiffs not present here, each suing in its individual or proprietary capacity in addition to suing in the name of the People; by contrast, the San Francisco and Oakland actions are brought *only* in the name of the People. Even assuming *arguendo* the People could somehow be considered a single party in all five cases, the minimal overlap of a single common plaintiff and five common defendants falls short of the substantial similarity required under Civil Local Rule 3-12(a).

Defendants downplay the substantial difference in parties by focusing only on those parties that are common to all five cases. But six common parties cannot outweigh the presence of thirty-five different named parties in the San Mateo actions that are not present in the San Francisco and Oakland actions. Defendants cite two instances in which courts have related cases involving a single differing party, but both cases are inapposite. *See Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, 2015 WL 4452136, at *12 (N.D. Cal. July 20, 2015) (relating case where plaintiff's pattern-and-practice claim required review by single judge); *Fin. Fusion, Inc. v. Ablaise Ltd.*, 2006 WL 3734292, at *3-4 (N.D. Cal. Dec. 18, 2006) (relating cases where two different plaintiffs, as indemnitors of same third party, sued same defendants regarding same patents). Defendants tellingly identify no instance in which cases have been related despite the minimal overlap presented here.

Second, the San Francisco and Oakland actions do not involve "substantially the same . . . property" as the San Mateo actions. *See* Civ. L.R. 3-12(a)(1). That the cases all involve California coastal property is not enough to satisfy the standard of Civil Local Rule 3-12(a): the cases must involve substantially the same property for this factor alone to satisfy the rule. *See Hynix Semiconductor Inc. v. Rambus Inc.*, 2008 WL 3916304, at *2 (N.D. Cal. Aug. 24, 2008).

Third, the San Francisco and Oakland actions are not related to the San Mateo actions just because they generally involve the problem of global warming. *See Adobe Sys.*, 2016 WL 9105173 at *3 (denying motion to relate cases that "generally involve[d]" same overarching legal issue but also involved differing facts and subsidiary legal issues). Indeed, Judge Armstrong just recently denied an effort to relate the San Mateo actions to a different global warming action involving different parties, claims, and property. *See* ECF Dkt. No. 22. Here, the San Francisco and Oakland actions plead a single public nuisance claim on behalf of the People, whereas the San Mateo actions

plead additional claims of strict product liability failure to warn, strict product liability design defect, public nuisance as property owners, private nuisance, negligence, negligent failure to warn, and trespass. The San Mateo complaints also seek additional relief – compensatory damages, punitive damages, and disgorgement of profits – that the San Francisco and Oakland cases do not seek.

The differences between the two sets of cases is already resulting in differing legal arguments and issues. For example, the San Mateo actions allege that Defendants should be held liable for undermining international treaties, federal regulation and legislation on global warming through, among other things, lobbying activities. *See, e.g.*, ECF Dkt. No. 1-2, ¶¶ 114, 126(b), 129, 135, 136, 138, 140, 141, 160, 181(d), 181(e). The San Mateo defendants' Notice of Removal thus contends that those action implicate "the foreign affairs doctrine" and "free speech" occurring "within the federal enclave of the District of Columbia." ECF Dkt. No. 1, ¶¶ 34-35, 69. These issues are irrelevant to the San Francisco and Oakland actions, which make no such allegations.

The plaintiffs in the San Mateo actions also allege, in support of their design defect and public nuisance claims, that the Court should apply a balancing test that would weigh the social benefits of fossil fuels against their social costs. *See* ECF Dkt. No. 1-2, ¶¶ 148, 184(e), 196, 222. The San Mateo defendants use this concession to support their argument for federal subject matter jurisdiction. *See* ECF Dkt. No. 1, ¶¶ 26-27. The San Francisco and Oakland complaints make no similar allegations. The San Mateo actions also allege that the defendants in those cases failed to comply with the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2697, which, again, those defendants have invoked in their removal petitions. *See* ECF Dkt. No. 1, ¶ 32. The San Francisco and Oakland actions make no such allegation.

Defendants gloss over the substantial differences between these cases by focusing their attention on a single overlapping claim and on some of the similar factual allegations – i.e., facts regarding Defendants' role in contributing to global warming-induced sea-level rise. But the many different claims in the San Mateo actions necessarily involve numerous factual allegations and legal issues not present in the San Francisco and Oakland actions. Indeed, the complaints in the San Mateo actions are nearly three times as long as the complaints in the San Francisco and Oakland actions. Defendants' conclusory assertion that those additional sixty pages of pleading make no

difference because the "gravamen" of all five cases is global warming-induced sea level rise is belied by the differing issues raised in their own notices of removal. The Court's local rules, moreover, do not apply a "common gravamen" test of relatedness. The People do not "ignore" the limited overlap here, but an overlap of six parties, one cause of action, and some factual allegations cannot obscure the weight of an additional thirty-five parties, seven causes of action, and voluminous additional factual and legal allegations in the San Mateo actions. The San Francisco and Oakland actions do not involve "substantially similar" events as the San Mateo actions. *See* Civ. L.R. 3-12(a)(1).

B. Separate Actions Will Not Create a Judicial Burden or Risk Inconsistent Results.

Conducting the San Francisco and Oakland actions separately from the San Mateo actions will neither require "an unduly burdensome duplication of labor and expense" nor risk "conflicting results." *See* Civ. L.R. 3-12(a)(2). The single claim in the San Francisco and Oakland actions is much narrower than the eight claims in the San Mateo actions, and the San Mateo actions will require resolution of legal and factual issues involving thirty-five parties not present in the San Francisco and Oakland actions. In such circumstances, conducting separate cases is appropriate. *See Ortiz*, 2013 WL 12175002 at *2; *Akeena Solar*, 2010 WL 2756536 at *1; *see also Sifuentes v. Brazelton*, 2014 WL 186867, at *1 (N.D. Cal. Jan. 16, 2014) (discussing Judge Alsup's decision not to relate cases involving one overlapping claim but multiple distinct claims).

In fact, relating the San Francisco and Oakland actions to the San Mateo actions may hinder rather than help the interests of judicial economy. The straightforward San Francisco and Oakland actions are likely to involve resolution of fewer threshold legal issues, and then to proceed on a faster and more direct path through discovery, than the San Mateo actions. The number of additional parties in the San Mateo actions portends a longer timeline and more complex case schedule, and a more cumbersome process for conferring among parties, than will be required in the San Francisco and Oakland actions. It would unfairly prejudice the People, through delays and additional expense, to subject the more straightforward San Francisco and Oakland actions to a timeline and case schedule dictated by the complexities of different plaintiffs' very different cases.

V. CONCLUSION AND REQUEST FOR RELIEF

The People respectfully ask the Court to deny Defendants' motion to relate cases.

Dated: November 3, 2017

Respectfully submitted,

** /s/ *Robb W. Kapla*
DENNIS J. HERRERA, State Bar #139669
City Attorney
RONALD P. FLYNN, State Bar #184186
Chief Deputy City Attorney
YVONNE R. MERÉ, State Bar #173594
Chief of Complex and Affirmative Litigation
ROBB W. KAPLA, State Bar #238896
Deputy City Attorney
MATTHEW D. GOLDBERG, State Bar #240776
Deputy City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4602
Tel.: (415) 554-4748
Fax.: (415) 554-4715
Email: robb.kapla@sfgov.org

Attorneys for The People

** Pursuant to Civ. L.R. 5-1(i)(3), the electronic filer has obtained approval from this signatory.

** */s/ Erin Bernstein*
BARBARA J. PARKER (State Bar #069722)
City Attorney
MARIA BEE (State Bar #167716)
Special Counsel
ERIN BERNSTEIN (State Bar #231539)
Senior Deputy City Attorney
One Frank H. Ogawa Plaza, 6th Floor
Oakland, California
Tel.: (510) 238-3601
Fax: (510) 238-6500
Email: ebernstein@oaklandcityattorney.org

Attorneys for The People

** Pursuant to Civ. L.R. 5-1(i)(3), the electronic filer has obtained approval from this signatory.

/s/ Steve W. Berman
STEVE W. BERMAN (*pro hac vice*)
steve@hbsslaw.com
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Ave. Suite 3300
Seattle, WA 98101
Tel.: (206) 623-7292
Fax: (206) 623-0594

SHANA E. SCARLETT (State Bar #217895)
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, California 94710
Tel.: (510) 725-3000
Fax: (510) 725-3001

MATTHEW F. PAWA (*pro hac vice*)
mattp@hbsslaw.com
BENJAMIN A. KRASS (*pro hac vice* pending)
benk@hbsslaw.com
HAGENS BERMAN SOBOL SHAPIRO LLP
1280 Centre Street, Suite 230
Newton Centre, Massachusetts 02459
Tel.: (617) 641-9550
Fax: (617) 641-9551

Of Counsel Attorneys for The People