

Nos. 18-15499, 18-15502, 18-15503, 18-16376

IN THE
United States Court of Appeals for the Ninth Circuit

COUNTY OF SAN MATEO, Plaintiff–Appellee, v. CHEVRON CORPORATION, <i>et al.</i> , Defendants–Appellants.	Appeal No. 18-15499 No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
CITY OF IMPERIAL BEACH, Plaintiff–Appellee, v. CHEVRON CORPORATION, <i>et al.</i> , Defendants–Appellants.	Appeal No. 18-15502 No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF MARIN, Plaintiff–Appellee, v. CHEVRON CORPORATION, <i>et al.</i> , Defendants–Appellants	Appeal No. 18-15503 No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF SANTA CRUZ, <i>et al.</i> , Plaintiff–Appellees, v. CHEVRON CORPORATION, <i>et al.</i> , Defendants–Appellants	Appeal No. 18-16376 No. 18-cv-00450-VC; 18-cv-00458-VC; 18-cv-00732-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding

**PLAINTIFFS-APPELLEES’ OPPOSITION TO MOTION TO ASSIGN
 APPEALS TO A SINGLE PANEL**

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Plaintiffs County of San Mateo, City of Imperial Beach, County of Marin, County of Santa Cruz, City of Santa Cruz, and City of Richmond hereby oppose Defendants' Motion to Assign Appeals to a Single Panel ("Motion").

ARGUMENT

The 32 Defendants-Appellants in these consolidated appeals (Nos. 18-15499, 18-15502, 18-15503, and 18-16376 (the "Chhabria Appeals")) have moved to have these appeals assigned to the same panel as another separately consolidated appeal (No. 18-16663 (the "Alsup Appeal")) *and* then to have both sets of appeals jointly calendared for hearing pursuant to General Order 3.3(c) ("A case may also be advanced in calendaring so that it may be heard at the same time as a case that involves the same legal issues.").

Plaintiffs-Appellees San Mateo et al. have no objection to the same panel hearing the Chhabria Appeals and the Alsup Appeal on different dates, *if* that suits the Court's convenience and *if* separate panels have not already been assigned to each set of appeals. But the San Mateo Plaintiffs *oppose* Defendants' request to jointly calendar the Chhabria Appeals with the Alsup Appeal so that they are heard at the same time because that would unduly delay the disposition of the Chhabria Appeals.

First, joint calendaring of both sets of appeals will necessarily delay the hearing and resolution of the Chhabria Appeals, which were fully briefed on March 14, 2019,

nearly four months ago.¹ The San Mateo Plaintiffs filed the California state court lawsuits underlying the Chhabria Appeals between August 24, 2017 and February 2, 2018. Because Defendants filed spurious removal petitions in those cases and then sought to appeal Judge Chhabria’s remand order in this Court, the San Mateo Plaintiffs have not been able to proceed past the threshold subject-matter jurisdiction stage in any of these cases. These cases belong in state court, as Judge Chhabria correctly concluded, and there is no just reason for further procedural delays.

Second, there is very little actual overlap in the issues presented by these appeals, even though the merits issues raised by the underlying lawsuits are similar. In the Chhabria Appeals, the threshold issue—which does not arise in the Alsup Appeal—is whether this Court’s appellate jurisdiction under 28 U.S.C. § 1442 to review Judge Chhabria’s remand order is limited to Defendants’ “federal officer jurisdiction” ground for removal only (rather than all other purported grounds for removal, which are *non-appealable* under 28 U.S.C. § 1447(d)). *See* No. 18-15499 Dkt. No. 88 at 11-12. Under the current law of this Circuit and the Second, Third, Fourth, Eighth, and Eleventh Circuits, this Court’s appellate jurisdiction extends *only* to “federal officer jurisdiction,” and not to Defendants’ other purported grounds for removal—each of which is non-

¹ By contrast, briefing in the Alsup Appeal was not completed until July 8, 2019, when the Court granted leave to plaintiffs City of Oakland and City and County of San Francisco to file the overlength reply brief they had lodged on July 1, 2019.

appealable under the federal removal statute.² Moreover, the Defendants’ assertion of federal-officer jurisdiction as a ground for removal (which Judge Chhabria appropriately rejected and characterized as “dubious,” ER7) was a makeweight from the start, and was likely asserted only as a potential basis for enabling an expected appeal from the inevitable remand order.

In the Alsup Appeal, by contrast, defendants’ weak “federal officer jurisdiction” argument is asserted only as a side note, comprising just a handful of pages among the parties’ 208 pages of appellate briefing, with most of the subject-matter jurisdiction argument focusing on defendants’ seven other purported grounds for removal. Moreover, the five defendants in the Alsup Appeal begin their briefing with an argument that plaintiffs Oakland and San Francisco *waived* any right to appeal Judge Alsup’s orders denying remand by failing to take an interlocutory appeal from those orders and by instead amending their complaints to conform to his ruling that these cases must proceed under federal common law or not at all. *See* No. 18-16663 Dkt. No.

² *See Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006); *Clark v. Kempton*, 593 F.3d 667, 668 (9th Cir. 2015); *Carter v. Evans*, 601 Fed. Appx. 527, 528 (9th Cir. 2015); *McCullough v. Evans*, 600 Fed. Appx. 577, 578 (9th Cir. 2015); *U.S. Bank Nat’l Ass’n. v. Azam*, 582 Fed. Appx. 710, 711 (9th Cir. 2014); *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012); *Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001) (per curiam); *Davis v. Glanton*, 107 F.3d 1044 (3d Cir. 1997); *State Farm Mut. Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 96 (2d Cir. 1981) (per curiam); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *but see Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015).

78 (Chevron Br.) at 12-16. The plaintiffs in the Alsup Appeal disagree with that argument, based on this Court's recent decision in *Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053 (9th Cir. 2019).

Given the threshold issue of appellate jurisdiction in the Chhabria Appeals, though, and the threshold issue of waiver in the Alsup Appeal, the *only* issue that may overlap between the Chhabria Appeals and the Alsup Appeal is whether "federal officer jurisdiction" supports removal. While there *could* be a potential overlap with respect to the other purported grounds for removal, that could only occur if: (1) Defendants in the *Chhabria* Appeals were able to establish, contrary to the overwhelming weight of authority, that this Court's appellate jurisdiction under 28 U.S.C. § 1447 extends to *all* purported grounds for removal, including those that are non-appealable under the statute; *and* (2) defendants in the Alsup Appeal were able to establish, contrary to the analysis in *Singh*, that Oakland and San Francisco waived their right to challenge Judge Alsup's denial of their motions to remand by not filing an interlocutory appeal and instead amending their complaints to conform to his ruling. It is therefore highly unlikely that the two appeals will involve *any* overlap, other than with respect to the near-frivolous issue of federal-officer jurisdiction removal.

Third, regardless of how much or how little the threshold subject-matter jurisdiction removal issues may overlap in the two sets of appeals, the vast majority of the briefing in the Alsup Appeal *has no counterpart in the Chhabria appeals at all*. The

principal focus of the Alsup Appeal is the many issues raised by Judge Alsup's orders granting the defendants' Rule 12(b)(6) motions to dismiss for failure to state a claim and the four out-of-state defendants' Rule 12(b)(2) motions to dismiss for lack of personal jurisdiction. *See* No. 18-16663 Dkt. No. 30 (Appellants' Opening Brief) at 29-58. None of those issues are before this Court in the Chhabria appeals (because Judge Chhabria properly left those issues for the state courts to address on remand). As a result, there is no just cause for delaying oral argument in the Chhabria Appeals or for consolidating oral argument in the relatively straightforward Chhabria appeals (which will focus on scope-of-appellate-jurisdiction and federal-officer jurisdiction only) with oral argument in the far more comprehensive Alsup Appeal (which will focus on waiver, all eight purported grounds for removal, all four purported grounds for dismissal for failure to state a claim, and the various grounds for challenging specific personal jurisdiction asserted by the five Alsup Appeal defendants).³

CONCLUSION

Given the timing of the briefing schedules in the two appeals — with all briefing in the Chhabria Appeal having been completed on March 14, 2019, a notice of proposed

³ While Defendants also state that Plaintiffs in all appeals “are now represented by the same counsel,” Motion at 7, that is not quite accurate. The only law firm that represents all Plaintiffs in both sets of appeals is Sher Edling LLP. The Chhabria Appeal Plaintiffs are also represented by different city and county counsel and by the private law firm of Goldstein & Russell, P.C., while the Alsup Appeal Plaintiffs are also represented by different city and county counsel and by the private law firm of Altshuler Berzon LLP.

oral argument dates having issued on June 11, 2019, and plaintiffs' Reply Brief in the Alsup Appeal not having been accepted for filing until July 8, 2019 — it would be far more efficient to schedule oral argument in the Chhabria Appeal for October or November 2019 (counsel for defendants has submitted a Statement of Unavailability for December 2019), and to schedule oral argument in the Alsup Appeal for some time in the winter or spring of 2020, after the first panel has preliminarily concluded how broadly or narrowly its appellate jurisdiction reaches under the federal removal statute.

For the foregoing reasons, Defendants' Motion should be denied.

Respectfully submitted,

Dated: July 11, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g), I certify that this response to a motion complies with the type-volume limitation of Circuit Rule 27(d)(2)(A). This response contains 1,446 words, excluding the parts of the response exempted by Federal Rules of Appellate Procedure 32(f).

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(c)(1).

/s/ Victor M. Sher _____
Victor M. Sher

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2019, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Victor M. Sher _____
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