ORAL ARGUMENT SCHEDULED FOR MAY 6, 2020

Case No. 19-1330

In the United States Court of Appeals for the Tenth Circuit

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, *et al.*,
Plaintiffs-Appellees

v.

SUNCOR ENERGY (U.S.A), INC., *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the District of Colorado (Civ. No. 18-1672)
(The Honorable William J. Martinez, J.)

PLAINTIFFS-APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

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MOTION FOR SUMMARY AFFIRMANCE

Pursuant to Rule 27.3(3)(A)(1)(b), Plaintiffs-Appellees respectfully move the Court for summary affirmance. Following the Fourth Circuit's recent decision in *Mayor of Baltimore v. BP P.L.C., ("Baltimore"),* 952 F.3d 452 (4th Cir. 2020), on the identical issues currently presented in this appeal, collateral estoppel applies to bar Defendant-Appellant Exxon Mobil Corp. ("Exxon") from relitigating the issue of the scope of appellate jurisdiction, as well as the merits of its asserted federal officer basis for federal jurisdiction. Because the Suncor Defendants[1] lack a federal officer argument of their own, summary affirmance of the district court's remand order in this case is thus appropriate.[2]

ARGUMENT

Summary disposition is appropriate here on the basis of a "supervening change of law." 10th Cir. Rule 27.3(A)(1)(b). In light of the Fourth Circuit's recent ruling in *Baltimore*, Exxon should be precluded from relitigating in this appeal the same issues already decided against it by the Fourth Circuit. That court ruled, on substantially identical arguments, that Exxon's oil production under federal leases did not meet the requirements for jurisdiction under the federal officer statute, and

[1] Defendants-Appellants Suncor Energy (U.S.A.) Inc.; Suncor Energy Sales, Inc.; and Suncor Energy, Inc.

[2] This motion is timely under Rule 27.3(3), as the supervening decision was issued after briefing in this appeal was completed. Accordingly, good cause is shown.

it also held that no other basis for removal can be reviewed on appeal. *Baltimore*, 952 F.3d at 459-71. Those rulings dispose of this appeal; accordingly, summary affirmance is warranted.

"Issue preclusion bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim." *Park Lake Res. Ltd. Liab. Co. v. U.S. Dep't of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004). Issue preclusion applies where:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Id. All four factors are satisfied here.

As to the first factor, the two issues decided by the Fourth Circuit against Exxon are identical to issues presented in this appeal. First, the Fourth Circuit rejected the argument made by Exxon and the other defendants in *Baltimore* that the Court of Appeals had jurisdiction to review "the entire remand order." *Baltimore*, 952 F.3d at 459. The Fourth Circuit held that "the only ground for removal that is made reviewable by § 1447(d) here is federal officer removal under § 1442," and that jurisdiction "does not extend to the seven other grounds for removal raised by Defendants, even though the district court rejected them in the

same remand order." *Id.* In so doing, the Fourth Circuit expressly considered and rejected the same arguments that Defendant Exxon makes in this appeal. *Compare id.* at 459-61 *with* Defendants-Appellants Brief ("Def. Br.") at 8-12.

Second, on the merits of federal officer jurisdiction, the Fourth Circuit rejected the same arguments Exxon makes here, holding that "the Defendants [including Exxon] who participated in the [Outer Continental Shelf Lands Act (OCSLA)] leasing program were not 'acting under' federal officials in extracting and producing fossil fuels on the [Outer Continental Shelf (OCS)]." *Id.* at 468. The defendants in *Baltimore* cited the same boiler-plate OCS lease language as Exxon cites in this appeal, *see id.* at 465; *compare* Def. Br. at 39-40, which the Fourth Circuit found to be "mere iterations of the OCSLA's regulatory requirements," insufficient to trigger the "acting under" relationship, *id.* at 465. The Fourth Circuit concluded that the "supervision and control to which OCSLA lessees are subject" is insufficient to "connote the sort of 'unusually close' relationship that courts have previously recognized" as supporting removal. *Id.* at 465-66 (citing *Watson v. Phillip Morris Cos.*, 551 U.S. 142, 153-54 (2007)). The Fourth Circuit further held that even if OCS leases could satisfy the "acting under" prong, however, the defendants failed on the third prong of the federal officer inquiry, as "[a]ny connection between fossil fuel production on the OCS and the conduct alleged in

the Complaint is simply too remote." *Id.* at 466; *see also id*. at 468. The issues raised in this appeal are identical.

As to the second factor in the issue preclusion analysis, the Fourth Circuit's decision plainly has sufficient finality. Although a dismissal on jurisdictional grounds does not constitute a judgment "on the merits," "questions of jurisdiction" are "an important exception to the general rule that a final adjudication on the merits is a prerequisite to issue preclusion." *Park Lake*, 378 F.3d at 1136. Thus, jurisdictional rulings, like the Fourth Circuit's in *Baltimore*, "preclude relitigation of the issues determined in ruling on the jurisdiction question." *Jones v. United States DOJ*, 137 F. App'x 165, 168 (10th Cir. 2005); *see also Matosantos Commer. Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1209-10 (10th Cir. 2001).

The remaining factors are likewise satisfied. Exxon was plainly a party to the other action and had a full and fair opportunity to litigate the issue.

Issue preclusion is thus appropriate to bar Exxon from relitigating both issues decided by the Fourth Circuit.

Although collateral estoppel does not run against the Suncor Defendants, they have no independent ability to appeal, because they never made any federal officer argument of their own. The federal officer statute only allows the "person acting under" a federal officer to remove; it does not allow a co-defendant to do so. 28 U.S.C. § 1442(a)(1); *see id.* at § 1442(a) (stating that actions against federal

officers and those acting under them, among other categories, "may be removed by them" to federal court – not by other litigants). Thus, if Exxon cannot assert federal officer jurisdiction, the Suncor Defendants cannot do so either. And since the Suncor Defendants did not assert any other basis for removal that is appealable, it does not matter whether they are estopped from arguing about whether one appealable basis opens the door to others; they have no ability to appeal at all separate from Exxon.

Accordingly, summary affirmance of the district court's order is warranted.

STATEMENT PURSUANT TO 10TH CIR. R. 27.1

All appellants oppose this motion.

Dated: April 24, 2020

Respectfully submitted,

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Dated: April 24, 2020

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Dated: April 24, 2020

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