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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CITY OF OAKLAND, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through Oakland City Attorney BARBARA J. PARKER

Plaintiffs,

v.

BP P.L.C., a public limited company of England and Wales; CHEVRON CORPORATION, a Delaware corporation; CONOCOPHILLIPS COMPANY, a Delaware corporation; EXXON MOBIL CORPORATION, a New Jersey corporation, ROYAL DUTCH SHELL PLC, a public limited company of England and Wales, and DOES 1 through 10,

Defendants.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the San Francisco City Attorney DENNIS J. HERRERA,

Plaintiffs,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON

First-Filed Case No. 3:17-cv-6011-WHA
Related to Case No. 3:17-cv-6012-WHA

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND THEIR FIRST AMENDED COMPLAINT

CORPORATION, a Delaware corporation, CONOCOPHILLIPS COMPANY, a Delaware corporation, EXXONMOBIL CORPORATION, a New Jersey corporation, ROYAL DUTCH SHELL PLC, a public limited company of England and Wales, and DOES 1 through 10,

Defendants.

OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINTS[1]

Nearly two years after voluntarily amending their Complaints to add two new plaintiffs and assert new claims under federal common law, Plaintiffs now seek to amend their Complaints for a second time, for no reason other than to "undo the changes made to the complaints" the last time around. Mot. at 2. While generally "[t]he court should freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a)(2), here justice requires otherwise. The claim that Plaintiffs are seeking to remove from their Complaints forms the basis of one of the questions presented in Defendants' certiorari petition that is currently pending in the Supreme Court in this case. Plaintiffs have articulated no reason why they need "to conform their complaints" to the Ninth Circuit's decision at this particular time, nor is any reason apparent. Mot. at 2. Indeed, given that Plaintiffs filed their motion seeking leave to amend their Complaints just weeks after Defendants submitted their certiorari petition, one is left to wonder whether Plaintiffs are seeking to manufacture a basis on which to argue that the Supreme Court should deny review. Although such a maneuver would not be effective, the proposed amendment still threatens to sow confusion and thereby prejudice Defendants—while also risking the waste of party and judicial resources. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (acknowledging that leave to amend may be denied for "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment"). Plaintiffs voluntarily amended their prior Complaints to add federal common law claims when they thought it was advantageous, and their eleventh-hour reversal of that voluntary decision to try to obtain a different litigation advantage years later should not be permitted. Moreover, because Plaintiffs' proposed amendment is not necessary at this time, their motion should be denied. At a minimum, the Court should defer ruling on the motion until the Supreme Court decides whether to grant the certiorari petition and this Court rules on Plaintiffs' renewed motion to remand, Dkt. 342.[2]

1. By seeking to short-circuit Supreme Court review, Plaintiffs' amendment now would prejudice Defendants. On January 8, 2021, Defendants filed a petition for writ of certiorari in

[1] This Court has already found that several Defendants are not subject to personal jurisdiction. Those Defendants submit this opposition subject to, and without waiver of, that jurisdictional finding.

[2] All docket references are to City of Oakland v. BP P.L.C., No. 3:17-cv-0611-WHA (N.D. Cal.).

the Supreme Court presenting the question "[w]hether a plaintiff is barred from challenging removal on appeal after curing any jurisdictional defect and litigating the case to final judgment in the district court." Pet. for Writ of Certiorari at i, *Chevron Corp. v. City of Oakland* (No. 20-1089). Less than three weeks later, Plaintiffs filed this motion to amend their Complaints so that they no longer "cur[e] [the] jurisdictional defect." *Id.* Defendants maintain that this amendment would not in fact preclude the Supreme Court from resolving the question presented. As one leading treatise explains, "when a plaintiff attempts to destroy the federal court's removal jurisdiction over the case by altering the complaint so that the case will be remanded," a court has the discretion to deny the amendment; and "even if the amendment is allowed, the Supreme Court has indicated that federal jurisdiction over the removed action will not be defeated." 6 C. Wright & A. Miller, *Federal Practice & Procedure* § 1487 (3d ed. 2020). Nevertheless, that the proposed amendment is unlikely to be ultimately successful insofar as its object is to derail Supreme Court review does not mean that it would be without prejudice to Defendants. On the contrary, just as the previous amendment served only to cloud this Court's jurisdiction and unnecessarily complicate proceedings in the Ninth Circuit, the latest proposed amendment would require Defendants (and the Court) to waste resources addressing eleventh-hour changes in litigation tactics before the Supreme Court.

2. The proposed amendment also prejudices Defendants to the extent that it seeks to avoid an adverse judgment on the merits. This Court already concluded that Plaintiffs' federal common-law claims are not viable. *See* Dkt. 283 at 15 ("[F]ederal courts should exercise great caution before fashioning federal common law in areas touching on foreign affairs. For the reasons explained above, such concerns of caution are squarely presented here. The federal common law claims must be dismissed."). While the Ninth Circuit vacated this Court's determination that it had federal-question jurisdiction, this Court's merits ruling is the law of the case and will bind Plaintiffs if this Court determines that one of the alternative removal grounds articulated in Defendants' notice of removal supports federal jurisdiction—as it should, as explained in Defendants' concurrently filed Opposition to Plaintiffs' Renewed Motion to Remand. Plaintiffs should not be permitted to avoid the preclusive (or persuasive) effect of this Court's merits ruling by removing their federal claims from their Complaints now that they know how those claims will be resolved.

3. The proposed amendment is both dilatory and futile. Plaintiffs first amended their Complaints in response to this Court's holding that federal jurisdiction lies over Plaintiffs' purportedly state-law claims. They did so even though Plaintiffs were not required to amend their Complaints because this Court held that "Plaintiffs' nuisance claims . . . *are necessarily* governed by federal common law." Dkt. 134 at 3 (emphasis added); *see also id.* at 8 ("Plaintiffs' claims for public nuisance, though pled as state-law claims, depend on a global complex of geophysical cause and effect involving all nations of the planet (and the oceans and atmosphere). . . . Federal jurisdiction is therefore proper."). Plaintiffs now seek to amend their Complaints in response to the Ninth Circuit's decision, even though amendment is again unnecessary because that Court held that Plaintiffs' previous amendment is irrelevant to the jurisdictional analysis. *See City of Oakland v. BP PLC*, 969 F.3d 895, 909 (9th Cir. 2020) ("[T]he Energy Companies argue that the Cities waived the argument that the district court erred in refusing to remand the cases to state court because the Cities amended their complaints to assert a claim under federal common law. We disagree."). Absent a court order, there is no reason for Plaintiffs to amend their pleadings in response to every judicial pronouncement regarding federal jurisdiction.

4. Plaintiffs' proposed amendment will prejudice Defendants, who have already spent three years ascertaining jurisdiction. In response to each new jurisdictional ruling in this case, Plaintiffs have sought to re-characterize their claims: they have alternately asserted nominally state-law claims, added explicitly federal-law claims, and now seek to "undo th[os]e changes." Mot. at 2. This, at the same time that Plaintiffs also purport to re-characterize their claims as "misrepresentation" claims—contrary to their previous characterizations—ostensibly to try to defeat federal jurisdiction. *See* Renewed Motion to Remand, Dkt. 342 at 13 ("[T]he primary tortious activity alleged in the People's representative public nuisance claim [is] Defendants' misrepresentations of the known dangers of fossil fuels."); *cf.* Opposition to Renewed Motion to Remand, Dkt. 349 at 3 (noting that in "opposing Defendants' motion to dismiss for failure to state a claim, Plaintiffs admitted that 'the primary conduct giving rise to liability remains Defendants' production and sale of fossil fuels'"). By continuously moving the goalposts, Plaintiffs have caused unnecessary hardship to Defendants and the Court alike. This motion is just the latest in a line of tactics employed by Plaintiffs to evade federal jurisdiction. If Plaintiffs did not want to expressly plead federal-law claims, they were under no

obligation to do so. Now that Plaintiffs have done so, however, they should not be permitted to once again alter their strategy midstream. *See Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) ("The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.").

5. At a minimum, the Court should defer ruling on Plaintiffs' motion to amend the Complaints until the Supreme Court decides whether to grant the certiorari petition and this Court rules on Plaintiffs' renewed motion to remand, Dkt. 342, and determines whether it has jurisdiction. Jurisdiction is a threshold question that must be decided prior to ruling on any other motion. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("[T]he first and fundamental question is that of jurisdiction." (citation omitted)); *Marley v. United States*, 567 F.3d 1030, 1034 (9th Cir. 2008) ("As a threshold matter, we must decide whether we have jurisdiction."); *Allen v. United States*, 871 F. Supp. 2d 982, 987 (N.D. Cal. 2012) (Alsup, J.) ("Jurisdiction is a threshold issue."). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible without exception.'" *Oeser v. Ashford*, 2007 WL 1280584, at *1 (N.D. Cal. May 1, 2007) (Alsup, J.) (quoting *Steel Co.*, 523 U.S. at 94–95). Accordingly, this motion should be resolved after the Supreme Court decides Defendants' certiorari petition and this Court decides Plaintiffs' renewed motion to remand.[3]

Moreover, resolution of Plaintiffs' renewed motion to remand may render this motion moot. Indeed, if the Court denies Plaintiffs' renewed motion to remand (as it should), Plaintiffs may decide not to pursue amending their Complaints because at least some of their claims may be governed by federal law.

For these reasons, Plaintiffs' motion for leave to amend should be denied or, at a minimum, deferred until the Supreme Court decides Defendants' pending certiorari petition and this Court rules on Plaintiffs' renewed motion to remand.

[3] As explained in Defendants' opposition to renewed motion to remand, Defendants submit that this Court should not rule on Plaintiffs' renewed motion to remand until the Supreme Court has decided the certiorari petition in this case and *BP P.L.C. v. Mayor and City Council of Baltimore*, No. 19-1189 (U.S.), a similar climate change-related case that presents related questions. Dkt. 349 at 1.

Respectfully submitted,

Dated: February 25, 2021

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