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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

| | |
|---|---|
| CITY OF HOBOKEN<br><br>Plaintiff,<br><br>v.<br><br>EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 | Case No. 2:20-cv-14243<br><br>JMV-MF<br><br>**DEFENDANTS' NOTICE OF MOTION TO STRIKE NEW ARGUMENTS IN PLAINTIFF'S [D.E. 101] REPLY IN SUPPORT OF ITS MOTION TO REMAND** |

COMPANY, AMERICAN PETROLEUM INSTITUTE,

Defendants.

**PLEASE TAKE NOTICE** that on April 19, 2021, or as may be scheduled by the Court, all of the above-named Defendants (the "Defendants"), through their attorneys, will move before the Hon. John Michael Vazquez, U.S.D.J., United States District Court for the District of New Jersey, at the Martin Luther King Jr. Federal Building and U.S. Courthouse, 50 Walnut Street, Newark, New Jersey, for an Order striking new arguments in Plaintiff's [D.E. 101] Reply in support of its Motion to Remand, and granting such other and further relief as the Court may deem appropriate.

In support of this motion, Defendants shall rely upon the accompanying Brief. A proposed form of Order is also submitted.

Respectfully submitted,

Dated: March 17, 2021
Florham Park, New Jersey

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| CITY OF HOBOKEN<br>Plaintiff,<br>v.<br>EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, AMERICAN PETROLEUM INSTITUTE,<br>Defendants. | Case No. 2:20-cv-14243<br><br>JMV-MF<br><br>**BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE NEW ARGUMENTS IN PLAINTIFF'S [D.E. 101] REPLY IN SUPPORT OF ITS MOTION TO REMAND**<br><br>**Motion Returnable: April 19, 2021** |

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## PRELIMINARY STATEMENT

All Defendants (the "Defendants") respectfully submit this Brief in support of their Motion to Strike New Arguments in Plaintiff's [D.E. 101] Reply in Support of its Motion to Remand (the "Reply").[1]

In the Reply, Plaintiff argues for the first time that (1) "Defendants should be collaterally estopped from claiming removal after losing *precisely* the same legal arguments in one court after another," Reply 32–33 (emphasis in original), and (2) Defendants' removal of this action lacked "an objectively reasonable basis," and, therefore, warrants an award of costs pursuant to 28 U.S.C. § 1447(c), Reply 30–31, 34–35. Although both arguments were available when Plaintiff filed its moving brief, Plaintiff opted to save them for its Reply and to deprive Defendants of the opportunity to respond. The Court should not countenance such behavior and should instead strike and decline to consider both new arguments.

[1] This Motion to Strike is submitted subject to, and without waiver of, any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

**ARGUMENT**

**THE NEW ARGUMENTS IN THE REPLY SHOULD BE STRICKEN**

As this Court has previously observed, "courts routinely disregard or strike arguments that were first raised in a reply brief." *Cooney v. Alberto*, 2017 WL 2712942, at *9 n. 11 (D.N.J. June 23, 2017) (Vazquez, J.). "The reason for not considering new bases for relief raised for the first time in a reply brief is self-evident: No sur-reply is permitted, so the opponent has no opportunity to address the new defense." *D'Alessandro v. Bugler Tobacco Co.*, 2007 WL 130798, at *2 (D.N.J. Jan. 12, 2007) (declining to consider statute of limitations argument that defendants did not raise on initial motion); *see Richardson v. United Airlines, Inc.*, 2017 WL 3037383, at *6 n.5 (D.N.J. July 17, 2017) (Vazquez, J.) (refusing to address a new argument raised in a reply brief because "[i]t is well-established that 'a party cannot raise an argument for the first time in a reply brief'") (quoting *Maliandi v. Montclair State Univ.*, 2017 WL 935160, at *5 (D.N.J. Mar. 9, 2017)); *Dana Transp. v. Albeco Fin.*, 2005 WL 2000152, at *6 (D.N.J. Aug. 17, 2005) (disregarding "newly minted" arguments in reply brief for the same reason). This court's local rules echo that reasoning: "[A] reply brief is a tool of advocacy not contemplated by the Rules of Civil Procedure. It is made available for the limited purpose of responding to the non-moving party's arguments or reinforcing the moving party's original position."

Cmt. 4(b)(1) to L. Civ. R. 7.1; *see Napier v. City of New Brunswick*, 2018 WL 6573465, at *5 (D.N.J. Dec. 13, 2018).

### A. Plaintiff's New "Collateral Estoppel" Argument

On reply, Plaintiff argues for the first time that Defendants are collaterally estopped from removing this lawsuit on the grounds set forth in their Notice of Removal ("NOR") because Defendants did so "after losing *precisely* the same legal arguments" in other, similar actions. Reply 32 (emphasis in original).

The Court should strike and refuse to consider this new argument because it could have been raised in Plaintiff's moving papers. Most of the decisions Plaintiff references in its Reply had previously been rendered well before Plaintiff filed its moving papers.[2] Yet Plaintiff chose to first raise its argument on Reply and to deprive Defendants of any opportunity to respond to it. *See* authorities cited at pp. 2–3, *supra*.

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[2] Notably, Plaintiff does not even identify which climate change related cases it contends would support its collateral estoppel argument. But, in any event, virtually all of the climate change cases it references in other parts of the Reply are from 2020 and before. *See, e.g.*, *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020); *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018); *Cnty. of San Mateo v. Chevron Corp.*, 960 F. 3d 586 (9th Cir. 2020); *Mayor & City Council of Baltimore v. B.P. P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019); *Mayor & City Council of Baltimore v. B.P. P.L.C.*, 952 F.3d 452 (4th Cir. 2020); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019); *Rhode Island v. Shell Oil Prods. Co. LLC*, 979 F.3d 50 (1st Cir. 2020).

### B. Plaintiff's New 28 U.S.C. § 1447(c) Costs Argument

Similarly, the Court should strike Plaintiff's new argument that Defendants should be ordered to "pay Plaintiff's costs under 28 U.S.C. § 1447(c)," Reply 30–31, 34–35.

Plaintiff's request for costs is premised on Defendants' purported "lack of an objectively reasonable basis *for seeking removal*." Reply at 34 (emphasis added); *see* 28 U.S.C. § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of *the removal*.") (emphasis added). But Defendants' Notice of Removal plainly and clearly set out the bases for removal long before Plaintiff filed its moving papers. In other words, *all* of the bases upon which Defendants removed this action—*i.e.*, those which Plaintiff now contends were not "objectively reasonable" for removal—were available to Plaintiff before it filed its opening brief. To the extent that Plaintiff wanted to argue that those grounds were so deficient as to warrant an award of costs pursuant to § 1447(c), it could and should have done so in its [D.E. 94] *moving* Brief.[3]

[3] Nor should Plaintiff be permitted to obscure this conclusion by misconstruing the extensive evidence Defendants offered in opposition to remand to show that they acted under federal officers as an improper attempt to amend the Notice of Removal *after* Plaintiff filed its [D.E. 94] Brief in support of its remand motion. Reply 31. That evidence does not seek to *amend* the notice of removal, but simply to *substantiate* the notice's allegation that "Defendants 'acted under' a federal officer." NOR ¶ 44. This is entirely proper, as a notice of removal need only "contain[] a short and plain

Because Plaintiff instead opted to save that argument for Reply and to deprive Defendants of the opportunity to respond, the Court should strike the argument and the request.

## CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter an Order:

1. That the following shall be stricken from Plaintiff's [D.E. 101] Reply Brief and disregarded by the Court:

a. Plaintiff's belated arguments that

i. "Defendants should be collaterally estopped from claiming removal after losing *precisely* the same legal arguments in one court after another," Reply 32–33 (emphasis in original); and

ii. Defendants' removal of this action warrants an award of costs pursuant to 28 U.S.C. § 1447(c), Reply 30–31, 34–35; and

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statement of the grounds for removal." 28 U.S.C. § 1446(a); *see Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 84, 87 (2014) ("A statement 'short and plain' need not contain evidentiary submissions."); *Grace v. T.G.I. Fridays, Inc.*, 2015 WL 4523639, at *3 (D.N.J. July 27, 2015) ("No evidentiary support is required" under the removal statute; rather, "the grounds for removal should be made in 'a short plain statement,' just as required of pleadings under Fed. R. Civ. P. 8(a)."); *Quick v. Kramer*, 2015 WL 7737347, at *2 (D.N.J. Nov. 30, 2015) (only "if jurisdiction is challenged" is a defendant required to support its jurisdictional allegations).

b. All reference to those arguments in the first paragraph on page 1 of that Brief; and

2. Granting such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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