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

CITY OF HOBOKEN Plaintiff, v. 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, Defendants.	Case No. 2:20-cv-14243 JMV-MF **REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE NEW ARGUMENTS IN PLAINTIFF'S [D.E. 101] REPLY IN SUPPORT OF ITS MOTION TO REMAND** **Motion Returnable: April 19, 2021**

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ARGUMENT

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

Defendants moved to strike two discrete arguments that Plaintiff raised for the *first time* in the Reply: (1) that Defendants should be collaterally estopped from advancing arguments in support of removal that some other courts overseeing similar climate-change cases rejected *before* Plaintiff filed its remand motion here, *see* Reply 32–33, and (2) that the grounds set forth in Defendants' Notice of Removal ("NOR") would justify the Court's requiring Defendants to pay the costs that Plaintiff incurred in seeking remand pursuant to 28 U.S.C. § 1447(c), *see* Reply 30–31, 34–35.[1] Because Plaintiff's Memorandum in Opposition to Defendants' Motion to Strike [D.E. 107] (a) admits that Plaintiff could have addressed both issues in its motion to remand, but opted not to; and (b) advances no cogent excuse for Plaintiff's failure to do so, the motion to strike should be granted in its entirety.[2]

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[1] This Reply is submitted subject to, and without waiver of, any defense, affirmative defense, or objection, including personal jurisdiction.

[2] In addition, Plaintiff's Opposition to Defendants' Motion To Strike was itself untimely, and for that reason the Court would be justified in disregarding it. Under Local Civil Rule 7.1(d)(2), Plaintiff's Opposition was due on April 5, 2021—14 days before the motion date of April 19. Plaintiff filed its Opposition on April 6, 2021. *See* ECF No. 107.

1. Plaintiff admits that arguments made for the first time on reply are waived, unless they address issues that were previously unforeseen or were raised for the first time in the opposition. Opp. 1. Plaintiff also admits that it could have raised its costs argument in its remand motion. According to Plaintiff, it "*did* have a basis to seek statutory costs under 28 U.S.C. § 1447(c) at the time it filed its motion to remand." *Id.* at 1 (emphasis in original). Similarly, Plaintiff concedes that virtually all of the climate-change related cases on which its collateral-estoppel argument is premised were decided *before* Plaintiff filed its remand motion. *Id.* at 4. These admissions are dispositive. *See Richardson v. United Airlines, Inc.*, 2017 WL 3037383, at *6 n.5 (D.N.J. July 17, 2017) (Vazquez, J.) (refusing to consider available arguments not raised in moving party's opening brief because "[i]t is well-established that a party cannot raise an argument for the first time in a reply brief" (citation and internal quotation marks omitted)). By strategically waiting to raise these arguments for the first time in its reply, even though they were available when Plaintiff filed its motion, Plaintiff sought to gain an unfair advantage of a type this Court has previously rejected. *Id.* The Court should not condone such improper gamesmanship in this case. *See, e.g., Rich v. New Jersey*, 2015 WL 2226029, at *14 (D.N.J. May 12, 2015) ("Consideration of [an] argument" "raised . . . for the first time in [a] reply brief" "would clearly prejudice [the opposing party], who ha[d] not been given an opportunity to respond.").

2. Plaintiff's admittedly intentional nondisclosure of its costs and collateral estoppel arguments cannot be excused on the ground that the moving papers somehow "gave [Defendants] an opportunity to cure" the purported "failures" with Defendants' removal. Opp. 1. To the contrary, by keeping Defendants in the dark about its intention to seek such costs and estoppel until its reply, Plaintiff deprived Defendants of any opportunity whatsoever to timely refute, "cure," or otherwise address those undisclosed arguments. The law is clear that Plaintiff cannot deny Defendants the "opportunity to address the new [argument]" by waiting to raise it for the first time after the opposition. *D'Alessandro v. Bugler Tobacco Co.*, 2007 WL 130798, at *2 (D.N.J. Jan. 12, 2007).

3. Finally, Plaintiff's suggestion that Defendants' submission of additional evidence in support of removal somehow triggered Plaintiff's ability to seek costs makes no sense. *See* Opp. 2. Defendants' additional evidence only strengthened their grounds for removal. If Defendants' removal grounds were so insubstantial as to justify an award of costs, then they necessarily would have been so at the time Plaintiff filed its remand motion. It is apparent that Plaintiff simply chose not to seek costs in its remand motion and, instead, to lie in wait until Defendants' briefing was complete. Such a maneuver is unfair and improper because it deprives Defendants of the full opportunity to respond. In any event, the

record did not support costs when Plaintiff filed its remand motion, and it certainly does not support costs now.

In addition, as shown at pages 4–5 and footnote 3 of Defendants' Motion to Strike, Plaintiff's argument that "The Removal Had No 'Objectively Reasonable Basis'" depends on Plaintiff misconstruing the additional evidence that Defendants proffered in opposition to remand as an improper attempt to amend the NOR. *See* Moving Brief [D.E. 106-1] at 4 n.3. But that additional evidence did *not* improperly seek to *amend* the NOR; rather, it properly *substantiated* Defendants' assertions that "Defendants 'acted under' a federal officer." NOR ¶¶ 44, 61–130. Accordingly, there was no amendment. Rather, it is undisputed that, although Plaintiff knew from the NOR itself *all* the bases upon which Defendants removed this action, Plaintiff impermissibly saved for reply its argument that it was entitled to costs under 28 U.S.C. §1447(d) on the ground that *the removal* lacked "an objectively reasonable basis." Moving Brief at 4-5 n.3.[3]

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[3] Ironically, misconstruing Defendants' *motion to strike* [D.E. 106-1] as *an unauthorized sur-reply brief*, Plaintiff now asks the Court to disregard Defendants' entire argument at pages 4-5 and n.3 of their Moving Brief. Opp. 2 n.2. Plaintiff's argument can be dispensed with quickly: the very case Plaintiff cites identifies a "motion to strike plaintiff's reply brief for raising new arguments" as a proper alternative to requesting permission to file a sur-reply. *Colmer v. ICCS Co.*, 2009 WL 2382222, at *2 (D.N.J. July 30, 2009); *accord*, *e.g.*, *Bayer AG v. Schein Pharm., Inc.*, 129 F. Supp. 2d 705, 715–16 (D.N.J. 2001), *aff'd*, 301 F.3d 1306 (Fed. Cir. 2002) (granting in part motion to strike arguments first advanced in

CONCLUSION

For the foregoing reasons, and those stated in their D.E. 106-1 Brief, 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

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,

Dated: April 12, 2021
Florham Park, New Jersey

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movant's reply papers); *Elizabethtown Water Co. v. Hartford Cas. Ins. Co.* 998 F. Supp. 447, 458 (D.N.J. 1998) (same).

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