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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through Oakland City Attorney BARBARA J. PARKER,

Plaintiff and Real Party in Interest,

v.

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

Case No.: 3:17-cv-06011-WHA

PLAINTIFF'S SUPPLEMENTAL BRIEF ON NAVIGABLE WATERS OF THE UNITED STATES

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the San Francisco City Attorney DENNIS J. HERRERA,

Plaintiff and Real Party in Interest,

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,

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PLAINTIFF'S SUPPLEMENTAL BRIEF ON NAVIGABLE WATERS OF THE UNITED STATES

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INTRODUCTION

The Court requested that each side address "the 'navigable waters of the United States' as that concept relates to the removal jurisdiction issue in this case." *See* ECF No. 128 in Case No. 3:17-cv-06011-WHA. Plaintiffs understand the Court's Order to refer to admiralty jurisdiction. As set forth below, the People's claims do not arise in admiralty. Even if they did arise in admiralty, these would be *in personam* cases properly brought and kept in state court rather than *in rem* cases where federal courts have exclusive jurisdiction. Finally, defendants waived admiralty jurisdiction by failing to invoke it in their notices of removal.

ARGUMENT

I. The People's Claims Do Not Arise in Admiralty.

A claim arises in admiralty only if three conditions are met. "The relevant tort or harm must have (1) taken place on navigable water (or a vessel on navigable water having caused an injury on land), (2) a potentially disruptive impact on maritime commerce, and (3) a substantial relationship to traditional maritime activity." *Ali v. Rogers*, 780 F.3d 1229, 1235 (9th Cir. 2015) (quotation marks omitted); *see also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

A. No Tort or Harm Has Taken Place on Navigable Water, and No Vessel on Navigable Water Has Caused an Injury on Land.

The first condition of admiralty jurisdiction, *i.e.*, the "locality requirement," has not been met. The relevant situs for determining admiralty jurisdiction in tort cases is "the place where the injury occurs." *Tobar v. United States*, 639 F.3d 1191, 1197 (9th Cir. 2011) (internal quotation marks omitted). And navigable waters include all places within the "ebb and flow of the tides," *Complaint of Paradise Holdings, Inc.*, 795 F.2d 756, 759 (9th Cir. 1986), with the "gangplank" serving as the "rough dividing line between the state and maritime regimes." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 206–07 (1971); *see also Ferguson v. Horizon Lines, LLC*, 602 F. App'x 664, 665 (9th Cir. 2015) (assault "at an entry gate facility at the Port of Oakland" did not have maritime situs). The classic maritime situs is the ship situated on navigable waters.

Here, the People allege injuries on lands threatened by extraordinary flooding and sea level rise caused by global warming. These low-lying lands are not "navigable waters" because dry land that could be inundated by unprecedented flooding is, by definition, far removed from the "gangplank" and the normal "ebb and flow of the tides." Although there are cases where admiralty jurisdiction has been extended to shallow seawater where shipping is prohibited or unwise, *see Paradise Holdings*, 795 F.2d at 759 (accident where boat drifted into shallow swimming area), the People are unaware of any case where admiralty jurisdiction has been extended so far beyond any ordinary understanding of "navigability"—*i.e.*, to land above the high water mark, land that might be a street or someone's living room. Moreover, to the extent that sea level rise threatens to increase the high water mark in the coming decades, that is harm that the People seek to abate by building seawalls and other infrastructure (on land) to protect property from the rising waters.

The most similar case the People have identified is *In re Katrina Canal Breaches Litigation*, 324 F. App'x 370 (5th Cir. 2009), which implicitly rejects the idea that areas flooded by an extraordinary storm are transformed into navigable waters for purposes of admiralty jurisdiction. The Fifth Circuit assumed without deciding that tortious activity associated with flooding from Hurricane Katrina occurred on navigable waters, because the canal where defendants tortiously maintained the levee was arguably "navigable water." *Id.* at 374. But there was no contention in *Katrina* that the storm surge converted New Orleans itself into "navigable waters." *See also Jerome B. Grubart*, 513 U.S. at 535 (similar: tunnel flooded by nearby navigable waters was treated as "land"; tort had marine situs exclusively because this flooding was caused by vessel on navigable waters). Simply put, the Embarcadero and Jack London Square may be gravely threatened by global warming, but they are not and hopefully never will be "navigable waters of the United States."

Moreover, there is no plausible argument that any aspect of the People's cases is related to any *vessel* on navigable waters. *Cf. Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 360 (1969) (drilling platforms are not vessels, and not within admiralty jurisdiction). The locality requirement has not been met and, on this ground alone, there is no admiralty jurisdiction.

B. The Claims Bear No Substantial Relationship to Traditional Maritime Activity.

The third condition, *i.e.*, the "nexus requirement," also has not been met. Defendants' tortious activity does not bear a "substantial relationship to traditional maritime activity." The inquiry is "whether a tortfeasor's activity … on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." *Jerome B. Grubart*, 513 U.S. at 539–40. For example, "[n]avigation of boats in navigable waters" is a traditional maritime activity, and "storing them at a marina on navigable waters is close enough," but flying an airplane over the water or "swimming" is not a traditional maritime activity. *Id.* at 540. Additionally, for the tort to have a "substantial relationship" with the traditional maritime activity, this activity must be "a proximate cause of the incident." *Id.* at 541.

In *In re Katrina Canal Breaches Litig.*, the plaintiffs sought admiralty jurisdiction over their claims that defendants' negligent dredging and maintenance of levees controlling navigable waters resulted in flooding of New Orleans during Hurricane Katrina. 324 F. App'x at 372. The Fifth Circuit assumed *arguendo* the location requirement was met, but found that the tortious activity itself—the negligent maintenance of the levees—was done for local drainage purposes that "cannot be said to be so substantially related to activity traditionally subject to admiralty law that imposing admiralty jurisdiction would be warranted." *Id.* at 380 (internal quotation marks and brackets omitted). The fact that the dredging was done with the ancillary purpose of improving navigation on navigable waters was insufficient to convert the activity to traditional maritime activity where the primary purpose was local flood control.

Here, the tortious activity is defendants' promotion and production of fossil fuels at massive, dangerous levels. These activities bear no relationship—much less a substantial relationship—to traditional maritime activities. The only tortious activity in these actions that is even plausibly related to a traditional maritime activity is defendants' production of some fossil fuels on offshore rigs. But this production is not a "traditional maritime activity." Rather, it is an activity that can and does occur everywhere, on land as well as water. *See Exec. Jet Aviation v. City of Cleveland*, 409 U.S. 249, 252 (1972) (rejecting admiralty jurisdiction over airplane crash at sea, because situs of

crash was "fortuitous"); *Hufnagel v. Omega Serv. Indus., Inc.*, 182 F.3d 340, 352 (5th Cir. 1999) ("Construction work on fixed offshore platforms bears no significant relation to traditional maritime activity.").

Moreover, even if this activity were a "traditional maritime activity," it is not a proximate cause of the People's injuries. Defendants' overall fossil fuel production occurs predominantly *outside* navigable waters, as does *all* of their promotion of fossil fuels—an activity over and above production that is essential to proving their liability for public nuisance. *See* Defs. Remand Opp., ECF No. 92, at 30:6-7 & n.22 (production on U.S. Outer Continental Shelf has been at most less than one-third of domestic production "in some years"); *People v. Conagra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 529 (6th Dist. 2017) (improper promotion in public nuisance case), *reh'g denied* (Dec. 6, 2017), *review denied* (Feb. 14, 2018). At bottom, defendants' tortious activity is their production and promotion of fossil fuels in massive, dangerous quantities. These are fundamentally land-based activities that do "not require the special expertise of a court in admiralty as to navigation or water-based commerce." *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1122 (9th Cir. 1984); *In re Katrina*, 324 F. App'x at 380 (similar).

There is no substantial connection between the defendants' creation of a public nuisance and any traditional maritime activity. For this reason, and because the tort did not occur on navigable waters, there is no admiralty jurisdiction.

II. Admiralty Jurisdiction Is Not a Basis for Removal.

Even if these cases arose in admiralty, which they do not, there would still be no basis for removal. The admiralty jurisdiction statute, 28 U.S.C. § 1333 (2018), provides that "district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled*" (emphasis added). This "saving to suitors" clause prohibits removal of all cases over which there is concurrent (as opposed to exclusive) admiralty jurisdiction in the state courts – which is to say that it prohibits removal of all *in personam* actions in admiralty, as described below.

A. *Exclusive* Federal Jurisdiction Is Limited to Admiralty Cases *In Rem*.

There is exclusive federal admiralty jurisdiction "only as to those maritime causes of action begun and carried on as proceedings in rem, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien. It is this kind of in rem proceeding which state courts cannot entertain." *Madruga v. Superior Court of State of Cal. in & for San Diego Cnty.*, 346 U.S. 556, 560 (1954); *see also Am. Dredging Co. v. Miller*, 510 U.S. 443, 446–47 (1994) ("An *in rem* suit against a vessel is . . . distinctively an admiralty proceeding, and is hence within the exclusive province of the federal courts.").

Here, there is no plausible basis to characterize the People's claims as *in rem* proceedings. The People do not treat vessels or things as offenders or defendants. Rather, the People contend that defendants—the five largest investor-owned fossil fuel corporations in the world (as measured by their production)—are violating California's public nuisance law. Thus, even if these cases arose in admiralty, there would be no exclusive federal jurisdiction.

B. There Is No Right to Remove *In Personam* Admiralty Cases, Which Are Subject to Concurrent Jurisdiction.

For *in personam* cases like the People's, the "saving to suitors" clause "leave[s] state courts competent to adjudicate maritime causes of action in proceedings in personam, that is, where the defendant is a person, not a ship or some other instrument of navigation." *Madruga*, 346 U.S. at 560–61 (internal quotation marks omitted). "Therefore, a plaintiff with in personam maritime claims has three choices: He may file suit in federal court under the federal court's admiralty jurisdiction, in federal court under diversity jurisdiction if the parties are diverse and the amount in controversy is satisfied, or in state court." *Ghotra by Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054 (9th Cir. 1997).

Here, the People exercised their choice to file these claims in state court, and it is well established that this is a genuine choice. Federal courts have held that the "saving to suitors" language in section 1333(1) forbids removal of all *in personam* admiralty and maritime claims, except where there is some other basis for jurisdiction. For example, the Ninth Circuit has noted "that saving clause claims brought in state court are not removable under 28 U.S.C. § 1441 absent

some other jurisdictional basis, such as diversity or federal question jurisdiction." *Morris v. Princess Cruises, Inc*., 236 F.3d 1061, 1069 (9th Cir. 2001) (citing *Romero v. Int'l Terminal Operating Co*., 358 U.S. 354, 371 (1959); *Alleman v. Bunge Corp*., 756 F.2d 344, 345-46 (5th Cir. 1984)). This rule has been well established in the federal courts at least since *Romero*, which emphasized that the "saving to suitors" clause was intended to preserve state courts' concurrent jurisdiction over *in personam* admiralty matters, and to preserve plaintiffs' "historic option" to choose a state forum in such cases, without being subject to removal. 358 U.S. at 371-72.

And this rule has been applied to reject admiralty-based removal in decisions by the Northern District of California, apparently without exception. *See GlobalSantaFe Drilling Co. v. Ins. Co. of State of Pa.*, 2006 WL 13090, at *3-4 (N.D. Cal. Jan. 3, 2006); *Little v. RMC Pac. Materials, Inc.*, 2005 WL 5095265, at *2 (N.D. Cal. July 11, 2005); *Wehr v. Pheley*, 2000 WL 236438, at *2 (N.D. Cal. Feb. 16, 2000) ("Unlike a cause of action that arises under federal law, an admiralty case that was properly filed in state court cannot be removed unless admiralty jurisdiction is exclusive.") (internal quotation marks omitted); *Triton Container Int'l v. Institute of London Underwriters,* 1998 WL 750941, at *3-4 (N.D. Cal. Apr. 1, 1998).

The application of this rule to the People's lawsuits is straightforward. The People have filed state-law statutory claims in state court, and section 1333(1) "saves" to the People their option to select this forum, and forbids using admiralty jurisdiction as a basis of removal. This blackletter rule is presumably why defendants, despite asserting seven highly creative bases for federal jurisdiction in their exceptionally detailed notice of removal, decided not to make admiralty jurisdiction an eighth.

In 2011, Congress revised section 1441(b) to clarify that complete diversity is required only where diversity jurisdiction is the basis of removal. A handful of district courts in the Fifth Circuit have held that this change authorizes admiralty-based removal of *in personam* claims filed in state court. *See, e.g.*, *Ryan v. Hercules Offshore*, 945 F. Supp. 2d 772, 778 (S.D. Tex. 2013); *see also Lu Junhong v. Boeing Co.*, 792 F.3d 805, 817–18 (7th Cir. 2015) (not reaching the issue because the plaintiffs did not raise the savings clause). But the vast majority of courts to consider the question have concluded that this change has no bearing on the non-removability of *in personam* admiralty

cases. *See Langlois v. Kirby Inland Marine, LP*, 139 F. Supp. 3d 804, 809-10 (M.D. La. 2015) (collecting cases). For good reason: section 1441(a) continues to provide an exception precluding removal of any case over which the district courts have original jurisdiction where Congress has expressly provided otherwise. *See* 28 U.S.C. § 1441(a) ("Except as otherwise expressly provided by Act of Congress . . . ."). And under *Romero* the savings clause of section 1333(1) is just such an exception, since "it was the unquestioned aim of the saving clause of 1789 to preserve" concurrent state court jurisdiction over admiralty matters, as well as the "historic option of a maritime suitor pursuing a common-law remedy to select his forum." 358 U.S. at 371-72.

The majority rule holding that the 2011 amendments did not alter the non-removability of *in personam* admiralty cases includes, as far as the People are aware, every court in the Ninth Circuit that has considered the question. *See, e.g., Moreno v. Ross Island Sand & Gravel Co.*, 2015 WL 5604443, at *19 n.13 (E.D. Cal. Sept. 23, 2015) ("District courts in this circuit agree with this majority view" that maritime cases are not removable); *see also Stark v. Markel Am. Ins. Co.*, 2017 WL 5151300, at *3 (W.D. Wash. Nov. 7, 2017); *Coronel v. AK Victory*, 1 F. Supp. 3d 1175 (W.D. Wash. 2014); *Bartman v. Burrece*, 2014 WL 4096226, at *3 (D. Alaska Aug. 18, 2014); *accord Forde v. Hornblower New York, LLC*, 243 F. Supp. 3d 461, 468 (S.D.N.Y. 2017) ("Because Defendants' argument for removal contradicts the saving to suitors clause, as interpreted by the Supreme Court and Second Circuit, the Court cannot conclude that jurisdiction exists in this case even given the 2011 amendment to § 1441."); *Glazer v. Honeywell Int'l Inc.*, 2017 WL 1943953, at *6 (D.N.J. May 10, 2017) ("The Court therefore concludes that the amendment to Section 1441(b) did not disturb the settled principle that Section 1331(1)'s savings-to-suitors clause allows a plaintiff to prevent removal where the only basis for federal jurisdiction is admiralty."); *Brown v. Porter*, 149 F. Supp. 3d 963 (N.D. Ill. 2016) (rejecting admiralty-based removal, and pointing out that Seventh Circuit's decision in *Lu Junhong* did not decide the issue). This is consistent with the view of distinguished admiralty commentators, who regard the minority view as an "error." *See, e.g.*, Force & Norris, *The Law of Maritime Personal Injuries* § 1:9 (5th ed. 2017) ("The vast majority of courts have concluded that amendments to the Removal statute have not changed the rule that cases that are solely within 28 U.S.C.A. § 1333 are not removable … It is submitted that these [minority view]

decisions may be in error."). In fact, the district judge who decided *Ryan*, the leading case for the minority view, has now become persuaded that he was wrong, and has held that maritime cases cannot be removed to federal court. *See Sanders v. Cambrian Consultants*, 132 F. Supp. 3d 853, 858 (S.D. Tex. 2015).

The foregoing authorities establish that admiralty removal is improper. As the Ninth Circuit has emphasized, "[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles*, Inc., 980 F.2d 564, 566 (9th Cir. 1992). In fact, in this case, where the People have filed a *parens patriae* case in their own courts, there must be a "clear rule" that "demands" removal. *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012). Defendants cannot meet this high standard.

III. Defendants Waived Admiralty Jurisdiction as a Basis for Removal Jurisdiction.

Even if these were admiralty cases, and even if there were an appropriate basis to remove them, defendants have waived their right to seek removal at this time. A defendant seeking to remove a case to federal court must do so within thirty days of being served with the complaint. *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Montana*, 213 F.3d 1108, 1117 (9th Cir. 2000); 28 U.S.C. § 1446(b). The notice of removal must contain a "statement of the grounds for removal." 28 U.S.C. § 1446(a). On October 20, 2017, Defendants filed their notices of removal (together, "NOR"). Their detailed, 32-page NOR listed seven grounds for removal but did not invoke admiralty jurisdiction as a basis for removal; it does not so much as cite 28 U.S.C. § 1333.

Defendants' failure to invoke admiralty jurisdiction in the NOR constitutes waiver. The "Notice of Removal cannot be amended to add a separate basis for removal jurisdiction after the thirty day period." *ARCO*, 213 F.3d at 1117 (quotation marks omitted); *accord O'Halloran v. Univ. of Washington*, 856 F.2d 1375, 1381 (9th Cir. 1988) (same); *SWC Inc. v. Elite Promo Inc.*, 234 F. Supp. 3d 1018, 1025 (N.D. Cal. 2017) (same). Given that defendants removed the case over three months ago, there is no dispute that the 30-day period to amend the NOR with a new ground for removal expired long ago. Courts routinely reject attempts by defendants to establish removal jurisdiction on grounds not raised in the notice of removal. *See, e.g., Marsoobian v. Transamerica*

Life Ins. Co., 2016 WL 7173737, at *7 (E.D. Cal. Dec. 9, 2016) (remanding case: "The Court will not consider this untimely theory of jurisdiction."); *Carr v. Nat'l Ass'n of Forensic Counselors, Inc.*, 2014 WL 7384718, at *4 (C.D. Cal. Dec. 29, 2014) (remanding case and refusing to consider "entirely new basis for removal jurisdiction" not found in notice of removal); *Rader v. Sun Life Assur. Co. of Canada*, 941 F. Supp. 2d 1191, 1196 (N.D. Cal. 2013) ("The notice of removal cannot be amended to add new bases for removal after the thirty day removal period has run, nor can a defendant present new grounds for removal for the first time in opposition to a motion for remand."); *Sonoma Falls Developers, LLC v. Nevada Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003) (ordering remand: "The court is unable to consider whether federal question jurisdiction might have provided a valid basis for removal because none of the defendants raised this issue in their notice of removal, which predicates removal jurisdiction solely on complete diversity."). Any attempt at this late juncture to add a new ground for removal would be outside the thirty-day time limit in 28 U.S.C. § 1446(b), which is "mandatory and a timely objection to a late petition will defeat removal." *Smith v. Mylan, Inc.*, 761 F.3d 1042, 1045 (9th Cir. 2014) (quotation omitted).

Defendants have waived admiralty jurisdiction as a basis for removal.

CONCLUSION

The People's claims do not arise in admiralty. And even if they did, the claims are *in personam*, properly brought and kept in state court. Moreover, defendants have waived their right to seek removal jurisdiction. The People's remand motion should be granted.

Dated: February 16, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2018, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List, and I hereby certify that I have caused to be mailed a paper copy of the foregoing document via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List generated by the CM/ECF system.

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