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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 REPLY 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 REPLY BRIEF ON NAVIGABLE WATERS OF THE UNITED STATES

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INTRODUCTION

Defendants waived admiralty jurisdiction by failing to timely invoke it. There is no admiralty jurisdiction in any event and even if there were, an *in personam* admiralty case is not removable. Defendants' newly invoked *Grable* arguments also fail as they once again confuse arguable federal defenses with the essential elements of the People's public nuisance claim. Nor does federal common law apply.

ARGUMENT

I. There is no admiralty jurisdiction.

Admiralty jurisdiction is lacking for three reasons. ***First***, it is blackletter law that grounds for removal are waived if not raised within the 30-day period provided by 28 U.S.C. § 1446. *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont.*, 213 F.3d 1108, 1117 (9th Cir. 2000). The People are aware of only one exception to this waiver rule and it is inapplicable. *See Williams v. Costco Wholesale Corp.*, 471 F.3d 975, 976-77 (9th Cir. 2006) (following plaintiff's amendment to complaint to drop his federal claim, defendant could rely upon previously uninvoked diversity jurisdiction because the case had been "*properly* removed" at the outset, *i.e.*, by way of a timely invocation of proper federal question jurisdiction (emphasis added)).

Second, even if, *arguendo*, this ground of removal was not waived, defendants fail to show that the claim satisfies either the "location" test or the maritime connection test of *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock*, 513 U.S. 527 (1995). The location test requires either (1) that the tort "take[] place on navigable waters" or (2) that the injury be "caused by a vessel on navigable waters." *See Ali v. Rogers*, 780 F.3d 1229, 1235 (9th 2015); 46 U.S.C. § 30101(a). The maritime connection test requires demonstrating that the activity giving rise to the incident has a "substantial relationship to traditional maritime activity." *Jerome B. Grubart*, 513 U.S. at 534.

The first location test requires an injury in an area within the "ebb and flow of the tides." *See* Pls.' Supp. Br. 1-2. Relying on a single case, *Red Shield Insurance v. Barnhill Marina & Boatyard*, 2009 WL 1458022 (N.D. Cal. May 21, 2009), Defendants incorrectly assert that the People's injuries "have occurred 'on the navigable waters of San Francisco Bay.'" Defs.' Supp. Br. at 7:10-11 (*quoting Red Shield*, 2009 WL 1458022, at *1). But *Red Shield* involved a floating home that ran

aground in the waters of a marina – an area clearly within the ebb and flow of the tides – and the case does not say anything to suggest that dry land areas (such as city streets and residences) threatened by unprecedented flooding count as navigable waters within the tidal zone. Defendants' perfunctory argument fails to satisfy the first location test.

Mobile offshore drilling units ("MODUs") – unlike traditional offshore drilling platforms – may well be "vessels" under the Admiralty Extension Act. But defendants still fail to satisfy the second location test because they have not established (or even alleged) that the land injuries are *caused by* these MODUs, *i.e.*, that they are the "proximate cause" of the injuries. *Jerome B. Grubart*, 513 U.S. at 536. (Proximate cause is also part of the maritime connection test and is discussed below.).

Defendants also fail to meet the maritime connection test. Oil and gas production – even from MODUs – is not a "traditional maritime activity." In *Herb's Welding v. Gray*, 470 U.S. 414 (1985), the Supreme Court concluded that the "exploration and development of the Continental Shelf are not themselves maritime commerce." *Id.* at 425. Although *Herb's Welding* involved a fixed drilling platform, courts have applied this basic proposition to torts arising on "vessels," including MODUs, that are engaged in offshore oil and gas production. For example, in *Texaco Exploration and Production, Inc. v. AmClyde Engineered Products, Inc.*, 448 F.3d 760 (5th Cir. 2006), an accident occurred on a vessel constructing a drilling platform. The Fifth Circuit held that the claims did not arise from "traditionally maritime activities." *Id.* at 771; *accord Barker v. Hercules Offshore*, 713 F.3d 208, 218 (5th Cir. 2013) (personal injury case on MODU: "the act which gave rise to the incident in question—in this case, replacing a casing over a well—was in furtherance of the non-maritime activity of offshore oil exploration and drilling.") (Clement, J., concurring).

Defendants' cases do not negate these decisions. *Theriot v. Bay Drilling*, 783 F.2d 527, 538 (5th Cir. 1986), was a contract case decided under a different standard, predates *Texaco* and *Barker*, and the contract at issue was about traditional vessels ferrying items to a rig. In *In re Oil Spill*, 808 F. Supp. 2d. 943, 949 (E.D. La. 2011), the district court summarily relied on *Theriot*, without analysis and without discussing *Texaco* or *Barker*, and the MODU in question actually burned and sank – a traditional maritime matter. Finally, *Taghadomi v. United States*, 401 F.3d 1080, 1089–90

(9th Cir. 2005), involved a failed search-and-rescue operation at sea, which is another classic maritime mishap; the "every activity involving a vessel" language that defendants cite is dicta, and is inconsistent with the governing law as set forth in *Jerome B. Grubart*. The bottom line is that the mere act of producing oil from a MODU is not a traditional maritime activity. This case is completely different from lawsuits arising from marine accidents. The most relevant case remains *In re Katrina*, 324 F. App'x 370 (5th Cir. 2009), where the fact that the flooding injury was caused by a vessel was a mere fortuity and did not implicate "the expertise of an admiralty court as to navigation or water-based commerce." *Id.* at 380 (quotation marks omitted). Just so here.

Moreover, even if MODU production counted as "traditional maritime activity," this production would not be "substantially related" to the People's nuisance claim – unlike cases involving unloading cargo from a vessel or a vessel striking a bridge. *Benjamin v. Natural Gas Pipeline*, 793 F. Supp. 729, 731 (S.D. Tex. 1992) ("The types of cases covered by the Act include situations where land-based damage or injury results from a vessel striking a bridge or pier, or from a vessel running aground, or because of a failure of the vessel's equipment during loading jobs."). The People's claim is based on (a) defendants' promotion of fossil fuels, which has nothing to do with MODUs, and (b) defendants' total production of fossil fuels at dangerous levels over a period of decades while knowing of the severe risk of harm. All Defendants say about their current MODU production is that it is "significant" (Defs.' Supp. Br. at 7:14), but the documents they cite in support merely describe five MODUs, some of which have been in production for only a few years. *See* Defs.' Supp. Br. at 7-8. Defendants do not say what the current MODU production is or how it is the "proximate cause" of the People's injuries, which is the test they must meet.

Third, even if there were original admiralty jurisdiction, *in personam* admiralty claims cannot be removed. Defendants fail even to acknowledge the existence of *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371 (1959), or the more recent cases providing the "majority view" on the effect of the 2011 changes to the removal statute. *See Moreno v. Ross Island Sand & Gravel*, 2015 WL 5604443, at *19 n.13 (E.D. Cal. Sept. 23, 2015) ("district courts in this circuit agree with this majority view"). The only cases defendants do cite are mischaracterized. *See* Defs.' Supp. Br. at 10 (citing *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 817–18 (7th Cir. 2015); *Tennessee Gas*

Pipeline v. Houston Cas. Ins., 87 F.3d 150, 153 (5th Cir. 1996)). *Lu* was based at least in part on the court's determination that any "saving to suitors" arguments was waived by the plaintiffs, 792 F.3d at 817, and its dicta have been rejected by *Brown v. Porter*, 149 F. Supp. 3d 963 (N.D. Ill. 2016). Defendants' interpretation of *Tennessee Gas* has never been the law in the Fifth Circuit. *See Barker*, 713 F.3d at 219, 223. The People's cases cannot be removed under admiralty jurisdiction.

II. Federal laws authorizing regulation of navigable waters do not confer *Grable* jurisdiction.

Defendants' belated attempt to shore up their argument for *Grable* jurisdiction by invoking federal laws that "authorize the [Army Corps of Engineers] to regulate" navigable waters, Defs.' Supp. Br. at 2:14-15, commits the same basic mistakes as their first attempt at *Grable* jurisdiction.

None of the federal statutes, regulations or actions defendants invoke – including the alleged permit requirements and the Army Corps' proposal to build a 3.8-mile levee in San Jose (not in San Francisco or Oakland), *see* Defs.' Supp. Br. at 2-3 – are necessarily raised as "an element, and an essential one" of the People's public nuisance claim. *Cal. Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538, 542 (9th Cir. 2011) (internal quotation marks omitted); *see also In re Circular Thermostat Antitrust Litig.*, 2005 WL 2043022, at *5 (N.D. Cal. Aug. 24, 2005) ("[t]he key word is 'necessary'"; rejecting federal jurisdiction even where federal issue "will no doubt be a large part of the proceedings in these actions," but was not "a necessary element of plaintiffs' state claims"). The new federal issues defendants raise are, at best, defenses such as ordinary preemption, which cannot give rise to federal question jurisdiction under the well-pleaded complaint rule. And the mere possibility that some mitigation infrastructure may require a federal permit is not an issue "necessarily raised" by the complaint. Notably, defendants fail to cite a single case authorizing removal under the Rivers and Harbors Act; as far as the People are aware the only case law on point precludes such removal. *See, e.g., Kieff v. Louisiana Land & Expl. Co.*, 1997 WL 627563 (E.D. La. Oct. 9, 1997).

Defendants once again rely on *Board of Commissioners v. Tennessee Gas Pipeline*, 850 F.3d 714 (5th Cir. 2017), where the plaintiffs sought to require defendants to backfill a huge network of canals – yet the only federal issue "necessarily raised" was whether federal law imposed a duty of

care in light of a total state law vacuum, and not whether the Corps would grant the permit needed to authorize all the relief requested. *Id*. at 721, 723. The case thus undercuts defendants' permit argument. And contrary to defendants' representation, *see* Defs.' Supp. Br. 5:16-19, the People have in fact not pleaded any deficiency in federal activities, which explains why defendants make this argument without citing to the complaints.

Nor are any of defendants' newly raised federal issues "actually disputed" or "substantial." There is no evidence to suggest that there are or even will be disputes about the legal issues defendants raise between municipal officials and the Corps, or that any hypothetical disputes will be substantial – in fact the Corps permits cited in defendants' brief show the opposite. Defs.' Supp. Br. at 4-5. In any event, any such disputes would be quintessentially "fact-bound and situation-specific," and thus are the antithesis of the nearly "pure issue[s] of law" that on very rare occasions suffice to create *Grable* jurisdiction. *See Empire Healthchoice Assur. v. McVeigh*, 547 U.S. 677, 700–01 (2006) (quotation marks omitted). Finally, the argument that the People's claims somehow "implicate" or are a "collateral attack" on *past* Corps decisions cannot create *Grable* jurisdiction, for reasons already provided. *See* Pls.' Reply Br. 14-16 (ECF No. 91) (distinguishing the same cases cited again in defendants' supplemental brief). Defendants' reconstituted *Grable* argument should be rejected.

III. Federal common law does not apply.

Defendants cite *Michigan v. Army Corps of Engineers*, 667 F.3d 765 (7th Cir. 2011), Defs.' Supp. Br. at 1, but in that case the plaintiff states expressly invoked federal common law in their complaint. Moreover, the court did not rely at all on navigable waters in deciding to apply federal common law. *See id*. at 770-72. A subsequent decision treated the Corps' legal authority to regulate the waterway as a merits issue (that did not bar the claim), *Michigan v. United States Army Corps of Eng'rs*, 758 F.3d 892, 895-96, 903-04 (7th Cir. 2014), which here means it cannot serve as a basis for removal.

CONCLUSION

The People's remand motion should be granted.

Dated: February 19, 2018

Respectfully submitted,

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