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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 the Oakland City Attorney,

Plaintiffs,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS, 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.

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

**PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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 CORPORATION, a Delaware corporation, CONOCOPHILLIPS, 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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**PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Other Authorities**

In response to this Court's May 25, 2018 Order, San Francisco and Oakland ("plaintiffs" or "the Cities") submit this supplemental brief on the extent to which adjudication of plaintiffs' federal common law nuisance claims would require this Court to consider the utility of defendants' alleged conduct. ECF No. 259.[1] This brief supplements plaintiffs' prior briefing on this topic. *See* Plaintiffs' Motion to Remand (ECF No. 81) at 19:13-20:2; Plaintiffs' Reply in Support of Motion to Remand (ECF No. 108) at 6:25-28, 11:22-13:2 & n.2; Plaintiffs' Opposition to Defendants' Motion to Dismiss (ECF No. 235) at 23:15-19 & n. 56; and Plaintiffs' Response to United States' Amicus Brief (ECF No. 253) at 9:5-11:6.

## I. INTRODUCTION

The Cities are expressly not seeking, in any way, to enjoin or curtail defendants' business activities, including defendants' current and future production of fossil fuels. *See* FAC ¶ 11 ("[p]laintiffs . . . do not seek to restrain defendants from engaging in their business operations"). In fact, the Cities' complaints allege that defendants will continue to "execute long-term business plans to continue and even expand their fossil fuel production for decades into the future." *Id.* ¶ 3. "Defendants' planned production of fossil fuels into the future will exacerbate global warming [and] accelerate sea level rise even further." *Id.* ¶ 4.

Rather than seeking to enjoin or curtail defendants' conduct—and thus limit the harmful effects of global warming—plaintiffs are instead seeking a remedy to *mitigate* those effects. "[The Cities] must take abatement action now to protect public and private property . . . by building sea walls and other sea level rise adaptation infrastructure." *Id.* ¶ 1. The relief plaintiffs seek here is thus tailored to those ends: plaintiffs seek an order "requiring Defendants to fund a climate change adaptation program," *i.e.*, to provide monetary relief to mitigate the harm defendants have caused and will continue to cause. *Id.* ¶¶ 142, 148.

Because the Cities seek to obtain monetary relief rather than to enjoin defendants' conduct, the Restatement (Second) of Torts—which all parties agree provides the relevant standards for

[1] All ECF references herein are to No. 3:17-cv-06011-WHA. "12b6 Br." refers to Defendants' Motion to Dismiss First Amended Complaint, ECF 225. "FAC" refers to the Amended Complaints.

plaintiffs' federal common law claims—expressly establishes that this Court need not consider or balance the utility of defendants' conduct. Defendants and their amici fail to acknowledge this governing standard, and its consequence for the Cities' claims. Defendants and their amici thus raise several arguments, including separation of powers, political question, and cooperative federalism, that expressly rely upon the concept that Congress is better equipped (than this Court) to weigh the utility of fossil fuel production. These arguments are wholly inapposite. Under the governing law, the Court need not engage in any balancing. The Cities have met their pleading obligations, and defendants' motion should be denied.

## II. ARGUMENT

### A. The Court is not required to consider the utility of defendants' conduct.

The Cities here seek an abatement fund, *i.e.*, monetary relief. Courts have long recognized that a different standard applies when considering whether to enjoin a nuisance versus whether to merely award monetary relief (while permitting the nuisance to continue). In *City of Harrisonville, Mo. v. W. S. Dickey Clay Mfg. Co.*, the plaintiff landowner sued a city for damages and an injunction, alleging injury to property through the city's drainage of sewage into a creek on plaintiff's property. 289 U.S. 334, 336 (1933) ("*City of Harrisonville*"). The federal district court awarded monetary damages and issued an injunction requiring the city to abate the nuisance. *Id*. at 337. The United States Supreme Court determined that the injunction was improper, in part, because the city invested substantial funds in erecting the plant and abandoning it would have significant adverse consequences for city residents. *Id*. at 339. Writing for a unanimous court, Justice Brandeis recognized that "[w]here substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable." *Id*. at 338. The Court thus imposed an equitable remedy requiring the defendant to pay for the depreciation in value of the plaintiff's property as a condition of withholding an injunction against the pollution.

Shortly thereafter, between 1934 and 1939, the American Law Institute published the Restatement (First) of Torts in order "to present an orderly statement of the general common law of the United States." Restatement (First) of Torts Intro. (1934). The Introductory Note for the

chapter on nuisance included a subsection entitled "*Action for damages distinguished from suit for injunction*," which succinctly incorporated the lesson from Justice Brandeis' opinion in *City of Harrisonville*: "It may be reasonable to continue an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying." Restatement (First) of Torts Ten 40 Scope Note (1939).

In 1970, the New York Court of Appeals decided the landmark case of *Boomer v. Atlantic Cement Co*., 26 N.Y.2d 219 (1970). In *Boomer*, the court affirmed a ruling that the defendant's cement plant constituted a nuisance by causing air pollution that harmed the plaintiffs' residential properties. But the economic value of the cement plant far outweighed the plaintiffs' property values, even though the harm to the plaintiffs was severe. *Id*. at 225. The court, reluctant to shut down the plant in light of the disparity in economic values favoring the defendant, thus declined to engage in the exercise of balancing the utility of defendant's operation against the scope of plaintiffs' harms. Instead, the court issued an injunction that would be dissolved on the payment of a monetary sum equal to the permanent damages suffered by the plaintiffs. By facilitating an outcome based upon an equitable order that resulted solely in monetary relief, the court obviated the need to conduct any balancing.[2]

Following *Boomer*, the American Law Institute finalized and published, in 1979, the nuisance provisions of the Restatement (Second) of Torts ("Restatement (Second)"), which reflect that this principle—that nuisance plaintiffs may recover monetary relief regardless of the utility of the offending conduct—had become an even more well-established component of nuisance law in the intervening decades. The parties here agree that the relevant standards governing plaintiffs' federal common law claims are provided by the Restatement (Second). *See* 12b6 Br. 16:13-17 & n.8. The Restatement (Second) sets out several ways a defendant's interference with a public right may be deemed "unreasonable" that do *not* require any balancing analysis.

***First***, new section 821B on "Public Nuisance" sets out a series of alternative circumstances establishing "unreasonableness," none of which involves any balancing of harm against utility, and

[2] *See also* Plaintiffs' Response to United States' Amicus Brief (ECF No. 253) at 10:11-11:6 (discussing *Boomer* in further detail).

comment *e* explains that the circumstances are "disjunctive," *i.e.*, "any one may warrant a holding of unreasonableness."[3] Comment *i*, entitled "*Action for damages distinguished from one for injunction*," expressly addresses the irrelevance of "utility" in an action for monetary relief.

> In determining whether to award damages, the court's task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done. Although a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it. In an action for injunction the question is whether the activity itself is so unreasonable that it must be stopped. It may be reasonable to continue an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying.

Restatement (Second) § 821B.

***Second***, section 826, regarding the unreasonableness of intentional invasions, was updated to include an independent, second prong, which expressly permits compensating nuisance victims without weighing the utility of defendant's conduct:

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if
>
> (a) the gravity of the harm outweighs the utility of the actor's conduct, **or**
>
> (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

Restatement (Second) § 826 (emphasis added). Comment *b* to section 826 further provides, in part, "Other invasions may impose harm so severe that the recipient cannot be expected to bear it without compensation, regardless of the utility of the activity in the abstract."

***Third***, section 829A, also newly added with the Restatement (Second), provides, in full:

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation.

Restatement (Second) § 829A.[4] Section 829A (which is partially based upon *Boomer*, *see* Reporter's Note), fits this case perfectly as the Cities have alleged harm that is undeniably severe.

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[3] The 821B factors include "[w]hether the conduct involves significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or . . . whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right." Restatement (Second) § 821B(2).

[4] Sections 826 through 831 of the Restatement (Second) of Torts are located under the Private Nuisance topic but, according to the comments, also apply to public nuisance.

Two related but distinct ideas are behind these provisions. First, while some activities are valuable enough to society that they should not be enjoined, they should nevertheless "pay their own way" by compensating victims for harms inflicted. In the terminology of economics, these tortfeasors should be forced to internalize costs of their operations rather than be allowed to externalize them onto property owners or the public. The second, and closely related concept, focuses on the need for fairness to plaintiffs. Some injuries or interferences caused by a defendant are so substantial that victims should not be required to bear them without compensation.

Since publication of the Restatement (Second), a wide range of courts have concluded that the utility of defendant's conduct is irrelevant when considering a nuisance claim seeking monetary relief. For example, in *National Energy Corp. v. O'Quinn*, 223 Va. 83, 86 (1982), property owners brought a nuisance action against an operator of a coal preparation plant, asserting that defendant's operation of the facility caused coal dust to be spread over the plaintiffs' properties and homes and caused loud and excessive noise to be emitted from the plant. In affirming a verdict for the plaintiffs and monetary relief, the Supreme Court of Virginia concluded that defendant's operation caused substantial damage to the plaintiffs, regardless of the nature and importance of its operation. *Id*. at 91. "It is of no consequence that an industry or business is a useful or necessary one. . . . The law does not allow an individual to be driven from his home, or to be forced to live in it in positive discomfort, even though the obnoxious condition may be caused by a lawful, useful business carried on in his neighborhood." *Id.* at 90-91.[5]

In *Wood v. Picillo*, 443 A.2d 1244 (R.I. 1982), the defendant dumped hazardous chemicals that seeped onto the plaintiffs' property; the court upheld a public nuisance judgment that, *inter alia*, ordered the defendants to finance the costs of removal and cleanup. The court expressly recognized that the unreasonableness element of public nuisance is not focused on the defendant's conduct but on the harm to the plaintiff:

> The essential element of an actionable nuisance is that persons have suffered harm or are threatened with injuries that they ought not have to bear. Distinguished from negligence liability, liability in nuisance is predicated upon unreasonable injury

[5] Internal citations, quotations, and footnotes omitted throughout unless otherwise indicated.

> rather than upon unreasonable conduct. Thus, plaintiffs may recover in nuisance despite the otherwise nontortious nature of the conduct which creates the injury.

*Id*. at 1247. Numerous other courts have reached the same conclusion.[6] As a leading treatise has noted, "the intentional interference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable. This is simply because a reasonable person could conclude that the plaintiff's loss resulting from the intentional interference ought to be allocated to the defendant." W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, *Prosser and Keeton on the Law of Torts* § 52 (5th ed. 1984).[7]

The foregoing logic applies equally whether the relief requested is traditional monetary damages or (as here) an abatement fund, *i.e.*, monetary relief to pay for sea walls and other necessary infrastructure. These two remedies share the essential trait that matters here—neither serves to limit or alter a defendant's conduct, thus neither requires a court to weigh or balance the utility of that conduct. In any event, any speculation about crafting an appropriate remedy could not support dismissal at this early stage. *See Baker v. Carr*, 369 U.S. 186, 198, (1962) ("*Baker*") ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to

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[6] *See, e.g.*, *Branch v. W. Petroleum, Inc.*, 657 P.2d 267, 274 (Utah 1982) ("Unlike most other torts, [nuisance law] is not centrally concerned with the nature of the conduct causing the damage, but with the nature and relative importance of the interests interfered with or invaded."); *Pendergrast v. Aiken*, 293 N.C. 201, 217-18 (1977) (nuisance liability can be imposed "if the resulting interference with another's use and enjoyment of land is greater than it is reasonable to require the other to bear under the circumstances without compensation") (citing drafts of Restatement (Second) provisions, including section 829A); *Jost v. Dairyland Power Coop.*, 172 N.W.2d 647, 653-54 (Wis. 1969) ("injuries caused by air pollution or other nuisance must be compensated irrespective of the utility of the offending conduct as compared to the injury."); *Hughes v. Emerald Mines Corp.*, 450 A.2d 1, 6 (Pa. Super. Ct. 1982) (harm to plaintiffs "was undeniably 'severe' and we are inclined to agree with the finder of fact that the loss is 'greater than they should be required to bear without compensation' *regardless of the utility of the conduct*") (quoting Restatement (Second) § 829A).

[7] Thus, an intentional nuisance as pled here (as opposed to a negligent nuisance) does not require the plaintiff to establish what the defendant should have done differently. *See id.* (defendant who "exercises utmost care in the utilization of known scientific techniques for minimizing the harm . . . and who is serving society well by engaging in the activity may yet be required to pay for the inevitable harm caused"). The Cities therefore do not base their claims on any hypothetical actions defendants could have taken; they expressly disavow the contention that their claims are based on how Congress might have acted if defendants had behaved differently.

fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at trial"); *see also Juliana v. United States*, 217 F. Supp. 3d 1224, 1242 (D. Or. 2016) (citing *Baker* for same point and denying motion to dismiss a global warming case brought against various government actors), *mandamus denied sub nom. In re United States*, 884 F.3d 830 (9th Cir. 2018).

The Cities' complaints expressly endorse this approach—set forth in the Restatement (Second) and adopted by courts throughout the country—whereby this Court need not balance, or even consider, the utility of defendants' conduct. The Cities seek only to recover an equitable abatement fund, *i.e.*, monetary relief. *See* FAC, p. 61 (San Francisco), p. 55 (Oakland). And the Cities expressly do not seek to regulate or interrupt defendants' business operations. *See id.* ¶ 11.

Stripped of the requirement to balance utility versus harm, the elements of the Cities' nuisance claims are straightforward. A public nuisance is an "unreasonable interference with a right common to the general public." Restatement (Second) § 821B(1). A defendant is liable for nuisance if the interference with the public right (or the invasion of another's use and enjoyment of land) is intentional and unreasonable. *Id.* § 822(a). "Intentional" conduct is where the actor knows that the interference is resulting or substantially certain to result from his conduct. *Id.* § 825(b). And "unreasonable" conduct (discussed in Section A, *supra*) includes, *inter alia*, (1) conduct that significantly interferes with "the public health, the public safety, the public peace, the public comfort or the public convenience" (Restatement (Second) § 821B(2)) and (2) invasions of another's use and enjoyment of land resulting in severe harm, greater than one "should be required to bear without compensation." *Id.* § 829A.

The Cities have properly and sufficiently pleaded the foregoing aspects of nuisance here. Defendants have produced massive quantities of fossil fuels. *See, e.g.*, FAC, ¶¶ 92-94. Fossil fuel products, when used exactly as intended, cause global warming. *See, e.g.*, *id.* ¶ 74. Defendants have known for decades that their fossil fuel products pose risks of "severe" and even "catastrophic" impacts on the global climate. *See, e.g.*, *id.* ¶ 95. Despite this knowledge, defendants have nonetheless promoted fossil fuel use in massive quantities through affirmative advertising, while at the same time downplaying global warming risks. *See, e.g.*, *id.* ¶ 103. Global

warming has caused and continues to cause accelerated sea level rise in the San Francisco Bay and the adjacent ocean with severe, and potentially catastrophic, consequences for the Cities. *See, e.g.*, *id.* ¶¶ 125, 128. The Cities have already incurred expenditures necessitated by defendants' past conduct. *See, e.g.*, *id.* ¶¶ 131-134.

**B. Several of defendants' and amici's arguments fail because the Court is not required to consider the utility of defendants' conduct.**

By charting a path for monetary relief, which obviates the need for this court to engage in any balancing of utility versus harm, plaintiffs have rendered several of defendants' and amici's arguments unavailing.

***First***, defendants' argument that the Cities' claims "violate the separation of powers," which amalgamates defendants' arguments under the political question doctrine, foreign policy preemption, and the dormant Commerce Clause (12b6 Br. 23:17-25-6), is inapposite. The Cities already thoroughly rebutted these arguments. 12b6 Opp. 23:12-25:16. But for purposes of this supplemental brief, defendants' arguments rely heavily on the idea that courts could not engage in balancing or weighing of the interests at issue here. *See, e.g.*, 12b6 Br. 25:17-18 ("there is no manageable standard for balancing the utility of using fossil fuels against the risks posed by emissions"); 12b6 Br. 25:15-16 (courts are "ill-suited" to "weigh competing policy interests"). As demonstrated above, these arguments are strawmen. The Cities' public nuisance claim does not require the Court to engage in any such weighing or balancing, so these arguments fail.[8] Indeed, as a panel of the Fifth Circuit found in a global warming tort case sounding in public nuisance, "the balancing of interests in Congress's legislative process . . . does not require federal courts to imitate the legislative process." *Comer v. Murphy Oil USA*, 585 F.3d 855, 876 (5th Cir. 2009).[9] The cases

[8] The related, overlapping arguments posed by *amici* in support of defendants are similarly unpersuasive for the same reasons. *See, e.g.*, United States Amicus Brief 6:7-9 (ECF No. 245) ("balancing the Nation's energy needs and economic interests against the risks posed by climate change should be left to the political branches of the federal government in the first instance"); Indiana Amicus Brief 7:22-23 (ECF No. 224-1) ("the questions of global climate change and its effects—and the proper balance of regulatory and commercial activity—are political questions not suited for resolution by any court").

[9] *Vacated for en banc review*, 718 F.3d 460 (5th Cir. 2013) (*en banc*), *appeal dismissed for failure of quorum*, 607 F.3d 1049 (5th Cir. 2010) (*en banc*); *see also Servicios Azucareros de*

defendants rely upon here for their balancing argument are, as that opinion held, based on "a serious error of law." *Id*.

***Second***, defendants' argument that various federal laws promote fossil fuel production and thus displace any claim based on the domestic production of fossil fuels (12b6 Br. 13:6-14:7) is rendered similarly ineffective.[10] More specifically, defendants argue that the Cities' claim requires the Court to determine whether a particular level of fossil fuel production is "unreasonable," and that this determination would therefore conflict with statutes that "subsidize and encourage" domestic fossil fuel production. 12b6 Br. 13:27-14:4. But the "unreasonable" element of the Cities' public nuisance claim does *not* commit the Court to engage in any cost-benefit analysis that might conflict with a purportedly similar analysis by Congress. Instead, the Court must determine whether or not it is unreasonable for the Cities to shoulder all of the costs of the harm under the circumstances. Thus, even if Congress had unequivocally expressed its support for increased domestic production of fossil fuels regardless of climate change impacts—which it has not—the public nuisance claim here is focused on the unreasonableness of the *consequences* of defendants' conduct on these particular plaintiffs, a matter on which Congress has not spoken.

***Third***, defendants' argument regarding "judicial caution" is also rendered ineffective by plaintiffs' pursuit of nuisance claims that do not require any judicial balancing of utility and harm. Defendants rely upon *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) ("*Sosa*"), for the position that courts should "exercise[e] great caution before recognizing novel causes of action under federal common law." 12b6 Br. 11:7-9.[11] Notwithstanding the fact that defendants misread *Sosa* (*see* 12b6 Opp. 10:22-11:2 & n.18), the conclusion defendants reach—"Plaintiffs' effort to enlist the Court in *regulating* foreign emissions must be rejected" (12b6 Br. 11:20-21, emphasis added)—highlights that the argument mischaracterizes the remedy plaintiffs seek here. Plaintiffs are not

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*Venezuela, C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 800 (5th Cir. 2012) (relying on 2009 *Comer* panel opinion as good law).

[10] Amicus Indiana makes this same argument in its brief at 19:24-20:7. Amicus United States makes related arguments in its brief at 20:20-22:13.

[11] Amicus United States similarly relies upon *Sosa* and other Alien Tort Statute cases for the proposition that this Court should exercise "judicial caution" and not "extend" the federal common law of nuisance. *See* United States Amicus 17:9-23.

seeking to "regulate" anything. As explained above, plaintiffs expressly do not seek to regulate or enjoin defendants' business operations.

## III. CONCLUSION

The Cities' claims are firmly rooted in the well-established framework of common law nuisance, which expressly includes the principal that Courts need not consider the utility of defendants' conduct when plaintiffs (like the Cities here) do not seek to limit or interrupt defendants' business practices.

And to the extent that this Court views any aspect of plaintiffs' cases as novel or groundbreaking, this further counsels in favor of denying defendants' motion. *See, e.g., McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004) (Rule 12(b)(6) motions "are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development."). In her recent order denying the United States' motion to dismiss another global warming case, Judge Aiken of the Oregon District Court concluded, "[t]his lawsuit may be groundbreaking, but that fact does not alter the legal standards governing the motions to dismiss. Indeed, the seriousness of plaintiffs' allegations underscores how vitally important it is for this Court to apply those standards carefully and correctly." *Juliana*, 217 F. Supp. 3d at 1262. As in *Juliana*, this Court should deny defendants' motion and permit plaintiffs the opportunity to develop a full factual record.

Dated: May 31, 2018

Respectfully submitted,

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