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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16 CITY OF OAKLAND, a Municipal
17 Corporation, and THE PEOPLE OF THE
STATE OF CALIFORNIA, acting by and
18 through the Oakland City Attorney,

19 Plaintiffs,

20 v.

21 BP P.L.C., a public limited company of
England and Wales; CHEVRON
22 CORPORATION, a Delaware corporation;
CONOCOPHILLIPS, a Delaware corporation;
23 EXXONMOBIL CORPORATION, a New
Jersey corporation; ROYAL DUTCH SHELL
24 PLC, a public limited company of England and
Wales; and DOES 1 through 10,

25 Defendants.
26
27
28

First Filed Case: 3:17-cv-06011-WHA
Related Case: 3:17-cv-06012-WHA

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

**AMENDED REPLY MEMORANDUM IN
SUPPORT OF DEFENDANT BP P.L.C.'S
MOTION TO DISMISS FIRST AMENDED
COMPLAINTS FOR LACK OF
PERSONAL JURISDICTION**

[Fed. R. Civ. P. 12(b)(2)]

Date: May 24, 2018
Time: 8:00 a.m.
Courtroom: 12

Judge: Honorable William H. Alsup

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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; 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-06012-WHA

TABLE OF CONTENTS

Page

1

2

3 Introduction 1

4 I. THE NINTH CIRCUIT’S “BUT FOR” TEST REQUIRES THE CITIES TO

5 SHOW NOTHING SHORT OF “BUT FOR” CAUSATION 2

6 A. The Controlling Cases Unanimously Require Classic But-For Causation 3

7 B. None Of The Cities’ Authorities Exercises Or Approves Of Exercising

8 Specific Jurisdiction Upon A Lesser Showing Than But-For Causation..... 4

9 C. The Cities May Not Loosen The Constitutionally Mandated Standard For

Specific Jurisdiction—But-For Causation—By Conflating It With Broader

Liability Rules 7

10 II. THE CITIES HAVE NOT MET THEIR BURDEN TO SHOW BUT-FOR

11 CAUSATION..... 9

12 III. EXERCISING JURISDICTION OVER BP P.L.C. WOULD BE

13 UNREASONABLE 10

14 Conclusion 11

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3

4

5 *AT & T Co. v. Compagnie Bruxelles Lambert,*

6 94 F.3d 586 (9th Cir. 1996)..... 7, 8

7 *Ballard v. Savage,*

8 65 F.3d 1495 (9th Cir. 1995)..... 9

9 *Boim v. Holy Land Found. for Relief & Dev.,*

10 549 F.3d 685 (7th Cir. 2008)..... 2

11 *Brackett v. Hilton Hotels Corp.,*

12 619 F. Supp. 2d 810 (N.D. Cal. 2008) 3

13 *Bristol-Myers Squibb Co. v. Superior Court,*

14 137 S. Ct. 1773 (2017) (Opp’n) 3, 5, 6, 11

15 *Corcoran v. CVS Health Corp.,*

16 169 F. Supp. 3d 970 (N.D. Cal. 2016) 9

17 *Daimler AG v. Bauman,*

18 134 S. Ct. 746 (2014) 11

19 *Doe v. Am. Nat’l Red Cross,*

20 112 F.3d 1048 (9th Cir. 1997)..... 3

21 *Doe v. Unocal Corp.,*

22 248 F.3d 915 (9th Cir. 2001)..... 3, 4

23 *Dubose v. Bristol-Myers Squibb Co.,*

24 2017 WL 2775034 (N.D. Cal. June 27, 2017) 5, 6

25 *Fireman’s Fund Insurance Co. v. National Bank of Cooperatives,*

26 103 F.3d 888 (9th Cir. 1996)..... 4, 5

27 *Hendricks v. New Video Channel Am., LLC,*

28 2015 WL 3616983 (C.D. Cal. June 8, 2015) 7

In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.,

2012 WL 1322884 (C.D. Cal. Apr. 16, 2012) 2

In re W. States Wholesale Nat. Gas Antitrust Litig.,

2010 WL 4386951 (D. Nev. Oct. 29, 2010)..... 7

1 *In re Western States Wholesale Natural Gas Antitrust Litigation,*
 2 715 F.3d 716 (9th Cir. 2013)..... 4, 5

3 *Keeton v. Hustler Magazine, Inc.,*
 4 465 U.S. 770 (1984)..... 6

5 *Khasin v. R.C. Bigelow, Inc.,*
 6 2016 WL 4502500 (N.D. Cal. Aug. 29, 2016)..... 9

7 *Langlois v. Deja Vu, Inc.,*
 8 984 F. Supp. 1327 (W.D. Wash. 1997)..... 8

9 *Lockwood Co. v. Lawrence,*
 10 77 Me. 297 (1885)..... 9

11 *Mavrix Photo, Inc. v. Brand Techs., Inc.,*
 12 647 F.3d 1218 (9th Cir. 2011)..... 7

13 *Myers v. Bennett Law Offices,*
 14 238 F.3d 1068 (9th Cir. 2001)..... 3

15 *Parnell Pharm., Inc. v. Parnell, Inc.,*
 16 2015 WL 5728396 (N.D. Cal. Sept. 30, 2015) 8

17 *People v. Gold Run Ditch & Mining Co.,*
 18 66 Cal. 155 (1884) 9

19 *Schwarzenegger v. Fred Martin Motor Co.,*
 20 374 F.3d 797 (9th Cir. 2004)..... 8

21 *Sullivan v. Ford Motor Co.,*
 22 2016 WL 6520174 (N.D. Cal. Nov. 3, 2016)..... 3, 6

23 *United Techs. Corp. v. Mazer,*
 24 556 F.3d 1260 (11th Cir. 2009)..... 10

25 *Univ. of Tex. S.W. Med. Ctr. v. Nassar,*
 26 570 U.S. 338 (2013)..... 2

27 *Wilden Pump & Engineering Co. v. Versa-Matic Tool Inc.,*
 28 1991 WL 280844 (C.D. Cal. July 29, 1991) (cited Opp’n) 6

Woodyear v. Schaefer,
 57 Md. 1 (1881) 9

Other Authorities

Fed. R. Evid. 801–807 9

Restatement of Torts § 431 cmt. a, § 432(1) & cmt. a..... 2

1	Restatement (Second) of Torts.....	2
2	W. Page Keeton et al., <i>Prosser and Keeton on Law of Torts</i> 265 (5th ed. 1984).....	2
3		
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Introduction

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2 This motion puts the Cities to their burden of making a prima facie showing that their claimed
3 property harms would not have existed today if not for the allegedly tortious *in-forum* conduct of BP
4 p.l.c. The amended complaints do not *plead* that required fact, and now the Cities present no evidence
5 —*nothing*—to prove that fact. They present no evidence that BP p.l.c.’s attributed production of fossil
6 fuels in or for the State of California or the United States as a whole was a *necessary* antecedent of the
7 alleged sea-level rise injuries for which they now sue. This failure is fatal to the Cities’ attempt to hail
8 this UK parent into California to answer for its indirect subsidiaries’ worldwide fossil fuel production.

9 The only purported causal fact that the Cities *do* proffer is not merely insufficient to meet their
10 burden, but conclusively demonstrates that the necessary but-for connection between their claims and
11 BP p.l.c.’s in-forum conduct does not exist. Specifically, the sole material the Cities offer is an article,
12 itself inadmissible hearsay, that estimates that BP p.l.c.’s *worldwide* fossil fuel production throughout
13 *all of recorded history* contributed “over 2 percent of total atmospheric greenhouse gases” from
14 “industrial sources.” (Opp’n at 6.) This stunning admission is as remarkable for what it *is* as for what
15 it is *not*. It is *not*, first of all, relevant to the jurisdictional analysis required by this motion, since it
16 reveals nothing (and purports to reveal nothing) about any contribution BP p.l.c.’s *tortious, in-forum*
17 conduct made to the Cities’ claimed injuries. As the Cities must admit, the two-percent estimate looks
18 only at *worldwide* production, not production in the forum; reaches back to the Industrial Revolution,
19 not production during the relevant time frame; and estimates only contributions to *emissions* (and only
20 “industrial” emissions), not to global warming or sea-level rise. Thus, the Cities’ only proffered
21 material does not move the needle with respect to their burden of proof because of what it is *not*—
22 evidence that BP p.l.c.’s tortious in-forum conduct was *necessary* to their alleged injuries.

23 The admission is equally remarkable for what it necessarily implies: namely, that if the same
24 “attribution science” methodology is applied only to *forum* production during the *shorter* time period
25 covered by the Cities’ claims (very generously, 1975 forward), BP p.l.c.’s attributed contribution to
26 industrial greenhouse gas emissions is orders of magnitude less than the “all in” two-percent estimate.
27 The Cities do not contest any of this. And of course, even this minuscule percentage would have to be
28 diluted further if run through the Cities’ theory for estimating contribution to *global warming* and *sea-*

1 *level rise*. More than a failure of proof compels granting this motion. The Cities’ own admissions
 2 furnish every reason to believe that their claimed property harms would have appeared no different
 3 today without BP p.l.c.’s forum activities.

4 Wanting for evidence to link BP p.l.c.’s forum conduct with their claimed injuries, the Cities
 5 focus on rewriting the but-for requirement for specific jurisdiction. Most significantly, they argue that
 6 purportedly more generous substantive standards of nuisance *liability* should substitute for the but-for
 7 test. They cannot. The well-established but-for test is constitutionally mandated. Looser substantive
 8 nuisance liability rules may not lower that constitutional floor to expand specific jurisdiction. The
 9 Due Process Clause “is made of sterner stuff” than substantive liability rules. *In re Countrywide Fin.*
 10 *Corp. Mortg.-Backed Sec. Litig.*, 2012 WL 1322884, at *9 (C.D. Cal. Apr. 16, 2012).

11 **I. THE NINTH CIRCUIT’S “BUT FOR” TEST REQUIRES THE CITIES TO SHOW**
 12 **NOTHING SHORT OF “BUT FOR” CAUSATION**

13 Every first-year student of Torts is taught what “but for” causation means: “this standard
 14 requires the plaintiff to show ‘that the harm would not have occurred’ in the absence of—that is, but
 15 for—the defendant’s conduct.” *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 346-47 (2013)
 16 (quoting Restatement of Torts § 431 cmt. a, § 432(1) & cmt. a). The Restatement (Second) of Torts,
 17 which makes but-for causation a generally required element of its substantial factor test, refers to a
 18 but-for cause as a “necessary antecedent” of harm; that is, conduct is *not* a but-for cause “if the harm
 19 would have been sustained even if the actor had not been negligent.” § 432(1). In a case the Cities
 20 feature, Judge Posner similarly acknowledges that “[a] ‘necessary condition’ is another term for a ‘but
 21 for’ cause.” *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 695 (7th Cir. 2008). The
 22 Supreme Court called it “textbook tort law that an action ‘is not regarded as a cause of an event if the
 23 particular event would have occurred without it.’” *Univ. of Tex. S.W. Med. Ctr.*, 570 U.S. at 347
 24 (quoting W. Page Keeton et al., *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984)).

25 Against this apparently universal understanding, the Cities claim the Ninth Circuit chose to
 26 name its specific jurisdiction causation standard a “but for” test when in reality it meant that any de
 27 minimis connection between forum conduct and harm can be enough. It cannot be.
 28

1 **A. The Controlling Cases Unanimously Require Classic But-For Causation**

2 In both their articulation of the but-for test and how they apply the test to specific facts, cases
3 from this Circuit uniformly require plaintiffs to demonstrate classic but-for causation. The phrasing of
4 the mandate could not be clearer: a plaintiff must show that she “would not have sustained her injury,
5 ‘but for’ [the defendant]’s alleged misconduct.” *Doe v. Am. Nat’l Red Cross*, 112 F.3d 1048, 1051-52
6 (9th Cir. 1997); *accord Doe v. Unocal Corp.*, 248 F.3d 915, 924 (9th Cir. 2001) (“but for” test asks
7 “whether plaintiffs’ claims would have arisen but for [the defendant]’s contacts with California”);
8 *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1075 (9th Cir. 2001) (“Plaintiffs must show that they
9 would not have suffered an injury ‘but for’ [the defendant]’s forum related conduct.”). This Court
10 described the test in identical terms: a “plaintiff must demonstrate that she would not have been
11 injured but for defendants’ conduct directed toward her in the forum.” *Brackett v. Hilton Hotels*
12 *Corp.*, 619 F. Supp. 2d 810, 818 (N.D. Cal. 2008).

13 The Cities do not forthrightly address the *causation* holdings of these and other controlling
14 cases discussed in the motion. Rather, their backhanded discussion of these cases aims to confuse by
15 focusing on irrelevant distinctions in the nature and extent of the defendant’s forum activities (that is,
16 evidence pertaining to the *purposeful availment* prong). For example, the Cities dismiss *Doe v.*
17 *American National Red Cross* as a case in which the defendant did not “engage[] in affirmative
18 conduct” in the forum; and they claim *Doe v. Unocal Corp.* is “inapposite” because the joint venture
19 agreement there “was not negotiated or executed in California.” (Opp’n at 15-16 (also fleetingly
20 discussing *Sullivan*, *Terracom*, and *Brackett*.) But each of these cases includes a key holding that
21 confirms that the but-for test for specific jurisdiction embraces the long-established meaning of but-for
22 cause. The Cities simply ignore these holdings in the hope the Court will ignore them too.

23 Similarly, the Cities muster barely a sentence on the Supreme Court’s eleven-month-old
24 exposition of the causal link required for specific jurisdiction, *Bristol-Myers Squibb Co. v. Superior*
25 *Court*, 137 S. Ct. 1773 (2017) (Opp’n at 15), which ignores the case’s key holding: that the plaintiffs
26 had not established specific jurisdiction over BMS in California because all of that extensive in-state
27 business activity was not what gave rise to their injuries and claims. *Id.* at 1781 (finding no “adequate
28 link between the State and the nonresidents’ claims”). *Bristol-Myers Squibb Co.* is thus entirely in

1 accord with Ninth Circuit case law requiring traditional but-for causation for specific jurisdiction.¹

2 **B. None Of The Cities’ Authorities Exercises Or Approves Of Exercising**
 3 **Specific Jurisdiction Upon A Lesser Showing Than But-For Causation**

4 In the face of this consistent Ninth Circuit case law establishing that the but-for test requires a
 5 showing of traditional but-for causation, the Cities cling to language from a few cases to the effect that
 6 the test is satisfied by “a direct nexus” between the defendant’s forum contacts and the cause of action.
 7 (Opp’n at 9:10-12 & n.30.) They also contend that defamation and IP infringement decisions “demon-
 8 strate that personal jurisdiction exists where a large and harmful course of conduct extends into the
 9 forum state.” (Opp’n at 11.) The Cities overstate the holdings of these cases and ignore the critical
 10 distinction between all of them and this case: in all of the Cities’ cases, unlike here, the defendant’s
 11 *forum conduct* was shown to be a but-for cause of the plaintiff’s *forum injury*. Thus, none of the cases
 12 relaxes or dilutes the Ninth Circuit’s test of traditional but-for causation.

13 The Cities incant “direct nexus” instead of “but for” to imply that they may satisfy the “arises
 14 out of or relates to” prong of specific jurisdiction through a lesser showing than but-for causation. The
 15 cases they cite that use the phrase do not dilute the but-for test at all, however; in fact, they all recite
 16 and apply the but-for test in circumstances where but-for causation clearly existed. In *In re Western*
 17 *States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d 716 (9th Cir. 2013), for example, the
 18 plaintiffs alleged that natural gas traders had conspired to inflate prices by manipulating price indices
 19 in the forum, which “resulted in the plaintiffs paying inflated prices for natural gas” in the forum that
 20 were higher “than they otherwise would have paid if the defendants’ conspiracy had not existed.” *Id.*
 21 at 742-43 & n.23. Their showing plainly met the but-for cause test, which the court recognized and
 22 applied. *Id.* at 742. The Cities also cite *Fireman’s Fund Insurance Co. v. National Bank of*
 23 *Cooperatives*, 103 F.3d 888 (9th Cir. 1996), for their “direct nexus” rule. There, liability insurers
 24 sought a declaratory judgment that they were not liable to the defendant for an arbitration award the

25 ¹ The Cities slay a strawman by repeatedly claiming BP p.l.c. would put them to the task of showing
 26 that its California activities “by themselves cause[d] all of the Plaintiffs’ injuries.” (Opp’n at 9:13-14;
 27 *id.* at 1:7-8.) That is not what the motion argued or the but-for test requires. The test requires the
 28 Cities to prove that BP p.l.c.’s imputed California contacts were a *necessary* antecedent of the claimed
 sea-level rise injuries, not the *sole* cause. See *Doe v. Unocal Corp.*, 248 F.3d at 925 (test fails where
 California contacts were “not necessary to” the plaintiffs’ injuries). As shown in the motion and
 below, the Cities have not made any such showing.

1 defendant had obtained in California against their California insured under a contract that included an
2 agreement to arbitrate in California. *Id.* at 891-92. As in *Western States*, the but-for test was applied
3 and easily satisfied, because, as the court observed, “[a]bsent [the defendant]’s California-related
4 activities, the insurers would have no reason to pursue declaratory relief.” *Id.* at 894. These cases thus
5 confirm that, far from loosening the but-for test, the “direct nexus” required for specific jurisdiction *is*
6 a but-for cause.

7 Nor do the Cities’ cases involving “a large and harmful course of conduct” (Opp’n at 11)
8 relieve them of their burden to show that BP p.l.c.’s *forum conduct* was a necessary antecedent of their
9 claimed harm. The Cities call *Dubose v. Bristol-Myers Squibb Co.*, 2017 WL 2775034 (N.D. Cal.
10 June 27, 2017), a case that “make[s] clear that the defendant’s forum-based activities need not cause
11 the entire harm” when the defendant’s conduct is “spread across many jurisdictions.” (Opp’n at 10.)
12 This characterization of *Dubose* is puzzling, because the defendants’ California conduct in that case
13 was, and was found to be, a but-for cause of the plaintiff’s injury. Specifically, the plaintiff alleged
14 that BMS and AstraZeneca had performed inadequate clinical trials for their Saxagliptin drugs, and
15 that “nearly every pivotal clinical trial necessary for NDA approval [of the drugs] involved studying of
16 the . . . drugs throughout the State of California.” 2017 WL 2775034, at *4. The plaintiff showed that
17 “but for the[se] pre-NDA development” activities in California, “the drugs would not have been sold
18 and marketed . . . nor ingested by Plaintiff,” and the plaintiff would not have been injured. *Id.* Based
19 on this showing, Judge Tigar ruled that the plaintiff had met her burden under the but-for test because
20 her “injuries would not have occurred but for [the defendants’] contacts with California because the
21 Saxagliptin clinical trials conducted here were part of the unbroken chain of events leading to
22 Plaintiff’s alleged injury.” *Id.* at *3. In short, even if not the *sole* link in the causal chain (because
23 clinical trials for the drugs at issue occurred in many states), the defendants’ *California* clinical trials
24 were a necessary antecedent of the plaintiff’s injuries. *Id.*

25 The Cities are thus mistaken in suggesting *Dubose* dispenses with the requirement to show that
26 the defendant’s *California* activities were a but-for cause of the plaintiff’s claimed injuries when they
27 are part of a larger course of conduct spread across many jurisdictions. (Opp’n at 10-11.) Indeed, that
28 suggestion runs afoul of the Supreme Court’s holding in *Bristol-Myers Squibb Co.* and Judge Tigar’s

1 ruling in *Sullivan v. Ford Motor Co.*, 2016 WL 6520174 (N.D. Cal. Nov. 3, 2016). All three cases
 2 involve “nationwide injurious conduct” (Opp’n at 11), with the critical distinction being that only the
 3 *Dubose* plaintiff showed her injuries would not have arisen but for the defendant’s conduct *in the*
 4 *forum* (California)—a showing the Cities have failed to make here.

5 The plaintiffs in the defamation and IP infringement cases the Cities rely on (*id.* at 9-11) like-
 6 wise carried their burden under the but-for test because they showed that, despite similar conduct in
 7 other states, the defendants’ *in-forum conduct* caused them *in-forum injuries* that gave rise to discrete
 8 causes of action that would not have arisen but for that in-forum conduct. In *Keeton v. Hustler*
 9 *Magazine, Inc.*, 465 U.S. 770 (1984), for example, the plaintiff showed she suffered reputational
 10 damage in New Hampshire (the forum state) that was caused by the defendant’s circulation of libelous
 11 magazines in New Hampshire. *Id.* at 776-77. Because the tort of libel “occur[s] wherever the
 12 offending material is circulated,” and “each communication of the same defamatory matter” gives rise
 13 to a “separate and distinct” cause of action, the plaintiff’s New Hampshire injuries and causes of
 14 action would not have arisen but for the defendant’s circulations of libelous material that state.² *Id.* at
 15 774 n.3, 777. The but-for test is accordingly met for those causes of action even though the defendant
 16 circulated more libelous magazines and caused greater harm outside New Hampshire.

17 The Cities’ intellectual property cases fit the same mold: infringing acts within the forum state
 18 caused discrete injury and gave rise to discrete causes of action that met the but-for test in their own
 19 right, regardless of any other infringing acts occurring outside the forum state. In *Wilden Pump &*
 20 *Engineering Co. v. Versa-Matic Tool Inc.*, 1991 WL 280844 (C.D. Cal. July 29, 1991) (cited Opp’n at
 21 10-11), for example, each sale by the defendant into California of a pump that infringed the plaintiff’s
 22 patent caused a discrete injury and gave rise to a discrete claim for patent infringement. *Id.* at *3-4.
 23 Those sales supported specific jurisdiction in California even though the defendant sold far more
 24 infringing pumps in other states. *Id.* at *4. While the court expressed its view that the but-for test is
 25 ill-suited for cases involving multiple discrete injuries, the case is in fact “a straightforward application
 26

27 ² The Supreme Court distinguished *Keeton* in *Bristol-Myers Squibb Co.* on the same basis—that is,
 28 that the plaintiff in *Keeton* had shown an adequate “connection” between the defendant’s conduct in
 New Hampshire and damage “caused within the State.” 137 S. Ct. at 1782.

1 of the ‘but for’ test” because “but for the [defendant’s] sales to California distributors, the plaintiff’s
 2 claim as to each act of infringement related to those sales would not have arisen.” *In re W. States*
 3 *Wholesale Nat. Gas Antitrust Litig.*, 2010 WL 4386951, at *3 (D. Nev. Oct. 29, 2010). The copyright
 4 infringement cases the Cities cite likewise involve infringement claims that would not have arisen but
 5 for the defendant’s forum activities. *See Hendricks v. New Video Channel Am., LLC*, 2015 WL
 6 3616983, at *6-7 (C.D. Cal. June 8, 2015) (defendant’s conduct in California of promoting and
 7 coordinating distribution of an infringing work harmed the plaintiff’s copyright in California); *Mavrix*
 8 *Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1222, 1228-29 (9th Cir. 2011) (defendant’s
 9 unauthorized posting of plaintiff’s copyrighted photos on defendant’s Web site, which was accessed
 10 by California individuals and aided the defendant’s sales of California-targeted advertising, injured the
 11 plaintiff in California).

12 Unlike the defamation and infringement plaintiffs in these cases, who claimed each wrongful
 13 act in the forum caused separate and discrete injuries in the forum and gave rise to discrete causes of
 14 action, the Cities here do not contend that each act of producing or promoting fossil fuels, or even each
 15 defendant, caused them a separate and distinct injury. Rather, they contend that all greenhouse gas
 16 emissions from all sources *anywhere in the world* caused them a single “indivisible injury.” (Opp’n at
 17 12:15-16; FAC ¶ 140.) It is this claimed injury the Cities must show would not have arisen but for BP
 18 p.l.c.’s forum activities. They have not made that showing, as discussed in the motion and herein.

19 **C. The Cities May Not Loosen The Constitutionally Mandated Standard For Specific**
 20 **Jurisdiction—But-For Causation—By Conflating It With Broader Liability Rules**

21 Unable to find a single governing case in which the court exercised specific jurisdiction on a
 22 showing of less than but-for causation, the Cities turn tail on jurisdiction case law to seek refuge in
 23 substantive rules of *liability* that they say apply more generous causation standards. Broad liability
 24 rules, however, cannot operate to lower the constitutional floor defined by the but-for test.

25 The Cities are not the first to use broad standards of substantive liability to try to pry open the
 26 due process limitations on personal jurisdiction. In response to those efforts, the Ninth Circuit has
 27 squarely held that because “[p]ersonal jurisdiction has constitutional dimensions,” a plaintiff “may not
 28 use liability as a substitute for personal jurisdiction.” *AT & T Co. v. Compagnie Bruxelles Lambert*, 94

1 F.3d 586, 590-91 (9th Cir. 1996); *accord Parnell Pharm., Inc. v. Parnell, Inc.*, 2015 WL 5728396, at
2 *4 (N.D. Cal. Sept. 30, 2015) (plaintiffs’ arguments that “pertain[ed] to liability, not personal
3 jurisdiction . . . will not be considered for this [personal jurisdiction] analysis”); *Langlois v. Deja Vu,*
4 *Inc.*, 984 F. Supp. 1327, 1334 (W.D. Wash. 1997) (substantive rules that “paint[] as broad a liability
5 stroke as possible” do not expand personal jurisdiction when they “knock[] heads with the United
6 States Constitution”; the “individuals subject to liability” under such rules are “still only . . . amenable
7 to suit in the jurisdiction where it would be ‘fair’ to call them into court”).

8 Due process’ supremacy over policy-driven liability rules is illustrated by *AT & T Co.* There,
9 the plaintiff argued that jurisdiction over a foreign parent corporation was “logically satisfied” by the
10 CERCLA rule that makes a parent substantively liable for environmental contamination caused by its
11 subsidiary, in this case in California. 94 F.3d at 590-91 & n.8. The court rejected this logic, reasoning
12 that “liability is not be conflated with amenability to suit in a particular forum.” *Id.* at 591. Personal
13 jurisdiction requirements do not flex to accommodate CERCLA’s broad liability provisions, the court
14 explained, even if they might “allow[] a parent corporation to avoid liability, and thus undercut[]
15 CERCLA’s sweeping purpose” to make responsible parties bear the costs of cleaning up contaminated
16 sites. *Id.* In sum, because “[p]ersonal jurisdiction has constitutional dimensions,” CERCLA’s policy
17 goals “cannot override the due process clause, the source of protection for non-resident[s].” *Id.*

18 The Cities ignore this settled line of cases and invite the Court to “use liability as a substitute
19 for personal jurisdiction,” *id.* at 590-91, by conflating the but-for test of jurisdiction with assertedly
20 laxer causation standards for nuisance liability. They do this in their lengthy discussion of what they
21 say is a “well-established causal standard applicable in multiple tortfeasor [nuisance] cases.” (Opp’n
22 at 12-15.) The Court should disregard these arguments “pertain[ing] to liability, not personal
23 jurisdiction,” *Parnell*, 2015 WL 5728396, at *4, as a thinly veiled attempt to water down due process
24 protections with tort liability rulings that are animated by perceived policy goals. Indeed, the Cities’
25 reference to purported rules of liability that they say can shift the burden to a defendant in special
26 circumstances (Opp’n at 12:18 & n.44) directly contradicts the Ninth Circuit’s mandate that the
27 *plaintiff* bears the burden of satisfying the but-for test. *E.g., Schwarzenegger v. Fred Martin Motor*
28 *Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

1 Most of the liability cases the Cities cite do not even apply a but-for causation test, and would
 2 accordingly dilute the due process protections of personal jurisdiction. In particular, the Cities
 3 advance a liability rule that anyone whose conduct “contributes” to a nuisance can be liable even when
 4 “the defendant’s conduct by itself would not have caused the harm,” and even if there are “a great
 5 many contributors.” (Opp’n at 12-13.) The Cities cite three century-old water pollution cases as the
 6 origins of the claimed rule (*id.* at 13 & n.45 (citing *People v. Gold Run Ditch & Mining Co.*, 66 Cal.
 7 155 (1884); *Woodyear v. Schaefer*, 57 Md. 1 (1881); *Lockwood Co. v. Lawrence*, 77 Me. 297 (1885))),
 8 and go on to cite later—all out-of-Circuit—cases they say follow the rule (*id.* at 13-14 & nn.46-52).

9 To the extent these liability cases involve causation in any form, they do not involve, apply, or
 10 define but-for causation. In any event, there is no need for the Court to settle which *liability* causation
 11 standard may apply to the Cities’ claims, because the Ninth Circuit has already spoken on the standard
 12 that governs this motion.

13 **II. THE CITIES HAVE NOT MET THEIR BURDEN TO SHOW BUT-FOR CAUSATION**

14 The motion pointed out that the Cities “have not alleged, either factually or even in conclusory
 15 terms, that BP p.l.c.’s California or U.S. activities are a but-for cause of the ‘global warming-induced
 16 sea level rise’ they say is damaging their coastlines.” (Mot. at 16.) The Cities do not disagree. Yet in
 17 their opposition, they still do not present any evidence to establish this essential jurisdictional fact.

18 They were required to do so. A plaintiff must “make[] a ‘*prima facie*’ showing [of required
 19 jurisdictional facts] by producing admissible evidence which, if believed, would be sufficient to
 20 establish the existence of personal jurisdiction.” *Corcoran v. CVS Health Corp.*, 169 F. Supp. 3d 970,
 21 979 (N.D. Cal. 2016) (citing *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995)). Here, the Cities
 22 have not merely presented evidence that is insufficient; they have presented *no* evidence, period.

23 The 2014 article by Richard Heede is the only material the Cities have submitted, purportedly
 24 to show that BP p.l.c. “contributed” to their claimed injuries. The article is not evidence, however; it
 25 is inadmissible hearsay and ineffective to meet the Cities’ burden.³ *See Khasin v. R.C. Bigelow, Inc.*,

26
 27 ³ The Cities could have submitted a declaration from Heede to support his methodology and data, but
 28 elected not to. It makes no difference that Heede’s article is peer-reviewed. Hearsay rules do not turn
 on whether an out-of-court statement is reviewed by the speaker’s colleagues. Fed. R. Evid. 801–807.

1 2016 WL 4502500, at *3 (N.D. Cal. Aug. 29, 2016) (citation to scientific article in summary judgment
 2 opposition constituted inadmissible hearsay). For this reason alone, the Court can and should grant
 3 this motion because the Cities have not made a prima facie showing of but-for causation. *See United*
 4 *Techs. Corp. v. Mazer*, 556 F.3d 1260, 1278-80 (11th Cir. 2009) (affirming dismissal where plaintiff
 5 failed to proffer admissible evidence in opposition to personal jurisdiction motion and instead relied on
 6 inadmissible hearsay in report).

7 And even if Heede's hearsay were evidence, it would be utterly deficient to carry the Cities'
 8 burden to show that BP p.l.c.'s California or U.S. activities were *necessary* to their claimed injury.
 9 The Cities cite the article solely to "show" that BP p.l.c. "is responsible for over 2 percent [2.47%, per
 10 the article] of total atmospheric greenhouse gases . . . from industrial sources" *worldwide* since the
 11 Industrial Revolution. (Opp'n at 6.) The Cities do not even contend that this contribution satisfies the
 12 but-for test. Nor could they. If two percent is BP p.l.c.'s contribution to *worldwide* industrial
 13 emissions for all of recorded *history*, it necessarily follows from the Cities' allegations that BP p.l.c.'s
 14 purported (i) in-forum, (ii) 1975-present, (iii) tortious contribution would be a tiny sliver of that two
 15 percent, which in turn must be further reduced for plaintiffs' attribution theory about sea-level rise.
 16 The Cities present no evidence, moreover, to show that if BP p.l.c. had reduced or halted its indirect
 17 subsidiaries' limited production activities in California or the United States as a whole, other suppliers
 18 would not have replaced that production, worldwide emissions would have decreased, and global
 19 warming and sea-level rise would have been curtailed. Durable demand for fossil fuels suggests that
 20 scenario is implausible. Thus, even without tailoring⁴ Heede's two-percent estimate to appropriately
 21 count only emissions from in-forum, "tortious" production, the Cities have not shown that BP p.l.c.'s
 22 imputed California or U.S. production was a necessary antecedent of their claimed harm.

23 **III. EXERCISING JURISDICTION OVER BP P.L.C. WOULD BE UNREASONABLE**

24 The Cities' breezy treatment of the "reasonableness" factors (Opp'n at 18-20) fails to address
 25 the compelling reasons why exercising jurisdiction over BP p.l.c. here would be uniquely unfair, as the
 26

27 ⁴ The Cities do not dispute that Heede's estimate is not limited in place or time, or that an appropriate
 28 jurisdictional analysis would assess only the impact of BP p.l.c.'s *forum* conduct during the relevant
time period.

1 motion showed. Most importantly, California has no paramount interest (vis-à-vis the other states and
2 rest of world) in applying its own or federal common law to regulate *worldwide* fossil fuel production,
3 especially by forcing an English parent company into calculatedly ruinous litigation. Doing so would
4 elevate the state’s sovereignty beyond all appropriate bounds, including by paying too “little heed to
5 the risks to international comity” at stake. *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014). These
6 considerations, together with the reality that permitting jurisdiction on this record would subject BP
7 p.l.c. to jurisdiction everywhere, tip the balance against jurisdiction given the “primary concern” of
8 due process is “the burden on the defendant.” *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780.

9 **Conclusion**

10 For the reasons stated herein and in the opening memorandum, BP p.l.c. respectfully requests
11 that the Court grant this motion and dismiss the first amended complaints as against BP p.l.c. for lack
12 of personal jurisdiction.

13
14 Dated: June 20, 2018.

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15
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