The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiff,

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.

No. 2:18-cv-00758-RSL

DEFENDANT BP P.L.C.'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

NOTE ON MOTION CALENDAR:
October 5, 2018

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

BP p.l.c. is a United Kingdom company that is not "at home" in Washington and therefore cannot be subjected to general jurisdiction under *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Nor can BP p.l.c. be subjected to specific jurisdiction because the County's claims do not "arise out of or relate to" any BP p.l.c. claim-related Washington activities—even imputing all activities of its subsidiaries to BP p.l.c.[1]—as that requirement is defined in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), and in controlling Ninth Circuit case law requiring that a foreign defendant's forum contacts be a "but-for" cause of the claimed injury.

Examining the vast contours of the County's claims reveals why the County cannot show, as it must, that its claims would not exist but for BP p.l.c.'s imputed Washington activities. First, the claims attack "worldwide" conduct, as the district court observed in dismissing similar lawsuits by Oakland and San Francisco. *City of Oakland v. BP p.l.c.*, Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 3109726, at *9 (N.D. Cal. June 25, 2018) ("The dangers raised in the complaints . . . are worldwide. Their causes are worldwide."). Second, the actors involved in the activities that are allegedly producing climate change and related sea-level rise are vast in number. They include sovereign nations that own the fossil fuels and decide to have them produced; private and sovereign companies that extract the fossil fuels, who far outnumber the five defendants the County has sued; transportation companies that move the raw product to treatment and refining centers; and various end users (manufacturers; power plants; airlines; federal, state, and local governments; and ordinary folks who drive cars and heat homes) who burn the fossil fuels. Third, and most critically, the County has not alleged and cannot show that any fossil fuel production in Washington that can

[1] The County has named BP p.l.c. as a proxy for various separately organized indirect subsidiary companies that now or in times past have extracted oil or natural gas from the earth. It has done so as a transparent expedient for trying to avoid the due process limitations on personal jurisdiction over those subsidiaries. While BP p.l.c. denies that its indirect subsidiaries' production of fossil fuels can properly be imputed to it for jurisdictional purposes, and reserves all rights in that regard for any other purpose or proceeding, solely for purposes of this motion it will assume that all Washington conduct by any indirect subsidiary may be imputed to BP p.l.c.

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be imputed to BP p.l.c. made *any* contribution, much less a jurisdictionally significant one, to global greenhouse gas emissions, and consequently, to the County's alleged injuries.

More specifically, the County's purported method of quantifying each defendant's individual responsibility, its so-called "attribution science" methodology,[2] would assign a share of worldwide emissions of industrial greenhouse gases to each defendant, based on that defendant's attributed *global production* of fossil fuels since the Industrial Revolution. That methodology does not even purport to establish any causal link between the County's claimed injuries and any oil or gas produced by BP p.l.c.'s indirect subsidiaries in Washington since 1980—the earliest date the County alleges defendants knew about climate change. What's more, as discussed below, judicially noticeable government data confirm that *no* production of oil or natural gas—by anyone—occurred in Washington during the complaint's time period. This fact is dispositive of the jurisdictional issue because production (*i.e.*, extraction) of fossil fuels is the specific conduct the complaint attacks as tortious and causative of the County's claimed injuries. Production is, most notably, the only conduct that the County's attribution methodology purports to link to greenhouse gas emissions. Under the County's own theory for linking its claimed injuries with the defendants' conduct ("attribution science"), therefore, BP p.l.c.'s *zero* production in Washington made *zero* contribution to global emissions and, therefore, to the County's injuries. Simply put, the only claim-related conduct (fossil fuel production) by a particular actor that the County asserts it can link to its injuries took place entirely outside the State of Washington.

For these reasons, the County cannot show that its claimed property harms would have looked any different today in the absence of Washington activities of BP p.l.c.'s indirect

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[2] To be clear, although BP p.l.c. does not challenge the attribution methodology solely for purposes of this motion, BP p.l.c. does not credit or otherwise subscribe to the methodology and, in fact, believes the analyses of Richard Heede and others discussed below (*infra* pp. 5-7) are flawed for a host of reasons. Nonetheless, because the County has the burden to demonstrate that its injuries would not have occurred but for BP p.l.c.'s claim-related Washington activities, BP p.l.c. discusses the theory that the County has signaled it will use to estimate BP p.l.c.'s individual contribution to its alleged injuries, and shows why, even if the flawed method is applied to BP p.l.c.'s Washington activities, the County cannot meet its burden.

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subsidiaries. It is unsurprising, therefore, that the complaint does not even allege the essential jurisdictional fact that BP p.l.c.'s Washington activities are a but-for cause of the alleged public nuisance and trespass in King County. The Court should accordingly dismiss the complaint as against BP p.l.c. for lack of personal jurisdiction.

II. BACKGROUND

A. The County's Claims

The County alleges that global warming-induced sea-level rise is threatening public and private property in the County. (Compl. ¶ 1.) It calls each defendant a "multinational, vertically integrated oil and gas company" (*id.* ¶¶ 12, 15, 18, 21, 24) that is among the "ten largest producers [of fossil fuels] in all of history" (*id.* ¶ 97). BP p.l.c., it claims, is the fourth largest such producer. (*Id.* ¶ 99.b.) The County has not named as a defendant any other fossil fuel producer (including any of the other "largest cumulative producers" (*id.*)), nor other refiners, transporters, or sellers. Nor has it sued anyone for *using* (combusting) fossil fuels, which of course is what releases greenhouse gases into the atmosphere. (*Id.* ¶¶ 79, 97.)

Defendants allegedly have known "since at least the 1980s" that fossil fuels would contribute to "dangerous global warming." (*Id.* ¶¶ 2, 5.) Fossil fuels do so, the County alleges, by releasing "greenhouse gases, including carbon dioxide (CO_2) and methane, which trap atmospheric heat and increase global temperatures." (*Id.* ¶ 79.) Greenhouse gases emitted when a defendant's fossil fuels are combusted "combine[]" in the atmosphere "with the greenhouse gas emissions from fossil fuels produced by the other Defendants, among others," and can remain for hundreds of years or longer. (*Id.* ¶¶ 4, 161.) Despite allegedly knowing these facts, defendants continued to produce "massive amounts of fossil fuels" and to promote their usage as "environmentally responsible," including by "denying mainstream climate science." (*Id.* ¶¶ 2, 5, 6.) The allegedly wrongful conduct at issue in the County's claims is the "production and promotion of massive quantities of fossil fuels." (*E.g.*, *id.* ¶ 161.) The County is not suing for defendants' "direct emissions of greenhouse gases." (*Id.* ¶ 10.)

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B. Absence Of Any BP p.l.c. Imputed Forum Contacts

BP p.l.c. is a public limited company that is registered in England and Wales and headquartered in London, England. (*Id.* ¶ 12.) BP p.l.c.'s subsidiaries explore for, produce, refine, market, and sell oil and natural gas around the globe. (*Id.* ¶ 13.) The County does not allege that BP p.l.c. itself is "at home" or directly operates in Washington, as opposed to operating only indirectly through subsidiaries.

In one paragraph, the County lists nine indirect subsidiaries of BP p.l.c. that allegedly are registered to do business and have designated agents for service of process in Washington. (*Id.* ¶ 36 (calling each an "agent" of BP p.l.c.).) The County alleges that "through its subsidiaries," BP p.l.c. has "[c]onnections to Washington" that have included operating oil refineries and terminals (through its subsidiary BP West Coast Products LLC), owning and operating pipelines for transporting refined products (through BP Pipelines (North America)), marketing natural gas (through IGI Resources, Inc.), and marketing gasoline by licensing the ARCO brand to gasoline stations. (*Id.* ¶¶ 36-47.)

The complaint does not allege, either factually or conclusorily, that these activities in Washington gave rise to the alleged public nuisance or trespass, or caused the County's claimed sea-level-rise injuries. Nor does it allege that global levels of greenhouse gases in the atmosphere (which are what the County asserts cause climate change) would have decreased *at all* in the absence of BP p.l.c.'s alleged contacts with Washington. Based on the complaint's citations to the 2014 and 2015 articles discussed in the next section, the County will seek to rely on an "attribution science" theory to try to prove BP p.l.c.'s individual contribution to global climate change. However, that theory cannot fill this jurisdictional void because it does not show that the alleged sea-level-rise harm would not have arisen but for the Washington activities of BP p.l.c.'s indirect subsidiaries, which made *zero* contribution to emissions if that attribution theory is applied.

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C. The County's Attempt To Link BP p.l.c.'s Conduct To The Claimed Harms

The County asserts defendants "are substantial contributors to the public nuisance of global warming that is causing injury to Plaintiff." (*Id.* ¶ 9.) Indeed, the County claims defendants' products "contribute[] measurably to global warming" (*id.*), and even claims that it has quantified defendants' individual and collective contributions to global greenhouse gas emissions. As purported support for this position, the complaint numerically ranks each defendant on a list of the "largest cumulative producers of fossil fuels," which the County copied from a 2014 study by Richard Heede in the supposed field of "attribution science" (*id.* ¶ 99.b & n.120 (citing Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854-2010*, 122 CLIMATIC CHANGE 229 (2014) ("Heede 2014"), *available at* https://link.springer.com/content/pdf/10.1007%2Fs10584-013-0986-y.pdf)), and cites a 2015 "peer-reviewed scientific" study (*id.* ¶ 99.g & n.124), which, building on Heede's 2014 work, claims to quantify "the responsibility of industrial carbon producers" for "anthropogenic climate change."[3] (Peter C. Frumhoff, Richard Heede, Naomi Oreskes, *The Climate Responsibilities of Industrial Carbon Producers*, 132 CLIMATIC CHANGE 157, 161-62 & Fig. 2 (2015), *available at* https://link.springer.com/content/pdf/10.1007%2Fs10584-015-1472-5.pdf.)

In these studies, Heede attempted to estimate the percentage of global industrial greenhouse gas emissions since the Industrial Revolution that can be attributed to fossil fuels and cement produced by each of what the studies call ninety "Carbon Majors." (Heede 2014 at 231-32.) To derive these percentages, Heede sought to collect information about *worldwide*

[3] The County's private counsel has called the methodology utilized in these studies "hugely important" because it "individualizes responsibility" for climate change "in a way that had not been done before." (Dan Zegart, *Want To Stop Climate Change? Take the Fossil Fuel Industry to Court*, The Nation, May 12, 2014, *available at* https://www.thenation.com/article/want-stop-climate-change-take-fossil-fuel-industry-court/.) In particular, according to the County's attorney, these attribution science methodologies "help[] assign blame" by providing "a list with names and numbers" (*id.*)—a list that "demonstrate[s] how much of the carbon dioxide and methane from the combustion of fossil fuels in the atmosphere is attributable to Exxon and Chevron and other particular companies going back to the 1800s." (*Climate Reparations: Companies to Be Liable for "Harm" "Going Back to the 1800s,"* YouTube (Feb. 18, 2016), https://www.youtube.com/watch?v=KFsGJ1-iEo8.)

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fossil fuel and cement production by each Carbon Major, including data on oil, gas, and coal production by worldwide affiliates of BP p.l.c. (or predecessor entities)[4] going back to 1913. (*Id.*) After applying numerous interpolations, assumptions, and adjustments to this necessarily incomplete historical production data, he then sought to calculate the volume of greenhouse gas emissions allegedly attributable to each Carbon Major's historical production activities by multiplying the estimated production volumes times various "emissions factors," which attempt to "account[] for the carbon content of each fuel, and therefore the CO_2 released on combustion to the atmosphere." (*Id.* at 232.) Finally, Heede sought to compute each Carbon Major's individual percentage contribution to global carbon dioxide and methane emissions by comparing the CO_2-equivalent emissions attributed to that Carbon Major's estimated historical production activities (the numerator) to estimates by other authors of worldwide carbon dioxide and methane emissions from all "industrial" sources, meaning oil, natural gas, coal, and cement production (the denominator), from 1751 to 2010. (*Id.* at 232, 237 Table 3.)

If the estimates generated by these flawed studies and relied upon by the County are accepted *arguendo* solely for purposes of this motion, the studies would attribute to all defendants as a group 11% (Compl. ¶ 99.c), and to BP p.l.c. individually 2.47% (Heede 2014 at 237 Table 3), of global "industrial" greenhouse gas emissions between 1854 and 2010. For at least the following reasons, however, these studies are not evidence of any causal relationship between BP p.l.c.'s (or any defendant's) claim-related Washington activities for purposes of establishing personal jurisdiction:

First, the emissions the studies would attribute to BP p.l.c. are not based on production of fossil fuels in Washington at all, but instead on estimates of *worldwide* fossil fuel and cement production by each Carbon Major. Indeed, the U.S. Energy Information Administration's official state energy reports confirm that there has been *no* oil or gas

[4] These studies even impute production to BP p.l.c. by business entities that BP p.l.c. did not own when the production occurred. For example, Amoco did not join BP p.l.c. until 1998 (Compl. ¶ 12), yet the studies count that company's pre-1998 production in BP p.l.c.'s total. As noted, BP p.l.c. does not contest that imputation solely for purposes of this motion. (*Supra* note 1.)

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production in Washington during the generous time period arguably covered by the County's claim. (Req. for Judicial Notice Ex. A at 9-10 ("no oil production . . . since the early 1960s" and no natural gas production since "the mid-20th century"), filed concurrently.) Therefore, the County's studies do not even purport to reveal anything about emissions linked to any producer's Washington activities. Stated differently, exactly *zero percent* of the 2.47% of global emissions the County would attribute to BP p.l.c.'s worldwide production is attributable to production in Washington during the complaint's time period.

Second, in estimating each producer's share of industrial *emissions*, the County's studies reveal nothing about any causal relationship between fossil fuel production (much less fossil fuel production *in Washington*) and the global warming and sea-level-rise *injuries* the County complains of here. Sea-level rise, not mere emissions, is the mechanism that is allegedly injuring the County. Yet the County's studies do not even purport to find any link between any BP p.l.c. Washington activities and sea-level rise or the County's claimed injuries.

III. ARGUMENT

THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION OVER BP P.L.C.

The complaint asserts that the Court has personal jurisdiction over BP p.l.c. based on BP p.l.c.'s purported "connections to Washington." (Compl. ¶¶ 36-47.) The complaint's theory of jurisdiction is accordingly that Washington's long-arm statute, which permits jurisdiction as broadly as due process allows, applies. *See Easter v. Am. W. Fin.*, 381 F.3d 948, 960 (9th Cir. 2004) ("Washington's long-arm statute . . . permits the exercise of jurisdiction to the full extent of the due process clause of the United States Constitution.").[5]

[5] Defendants' concurrently filed motion to dismiss for failure to state a claim demonstrates that the County's claims, if any exist, are governed by federal common law. In some cases, the federal long-arm statute of Federal Rule of Civil Procedure 4(k)(2) permits a district court to exercise jurisdiction over a foreign defendant for a claim arising under federal law, if the defendant is not subject to personal jurisdiction in any state and the exercise of jurisdiction comports with due process. *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1072 (9th Cir. 2017). The due process analysis under Rule 4(k)(2) is "nearly identical to traditional personal jurisdiction analysis with one significant difference: rather than considering contacts between [the defendant] and the forum state, [the court] consider[s] contacts with the nation as a whole." *Id.* (quoting *Holland Am. Line*

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Due process, however, limits the power of a court "to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). The Supreme Court "recognize[s] two types of personal jurisdiction: 'general' (sometimes called 'all-purpose') jurisdiction and 'specific' (sometimes called 'case-linked') jurisdiction." *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1779-80. General jurisdiction permits a court to hear "*any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State." *Id.* at 1780 (emphasis original). By contrast, a court exercising specific jurisdiction may only hear suits that "arise[e] out of or relat[e] to the defendant's contacts with the *forum*." *Id.* (quoting *Daimler AG*, 134 S. Ct. at 754).

The plaintiff bears the burden of establishing that jurisdiction is proper, *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015), and must make "a prima facie showing of jurisdictional facts to withstand the motion to dismiss," *id.* (quoting *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011) (quoting *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010))). In evaluating whether the plaintiff has met this burden, the court may not take as true "mere 'bare bones' assertions of minimum contacts with the forum or legal conclusions unsupported by *specific factual allegations*." *Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007) (emphasis added); *Abalos v. Bronchick*, No. C07-844RSL, 2008 WL 2544893, at *1 (W.D. Wash. June 23, 2008).

As shown below, the County has not pleaded and cannot prove the facts needed to establish either general or specific jurisdiction over BP p.l.c.

A. BP p.l.c. Is Not "At Home" (And Thus Subject To General Jurisdiction) In Washington

A foreign corporation is not subject to general jurisdiction in a state unless its

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Inc. v. Warstila N. Am., Inc., 485 F.3d 450, 462 (9th Cir. 2007)). The rule applies only in "rare situations" where the defendant has "extensive contacts to the country." *EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1086 n.6 (C.D. Cal. 2010). Here, the complaint does not allege that BP p.l.c.'s contacts with the United States as a whole confer personal jurisdiction under the federal long-arm statute. This motion accordingly addresses the only theory of jurisdiction pled in the complaint: that BP p.l.c.'s purported connections to Washington support personal jurisdiction under Washington's long-arm statute.

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"affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Daimler AG*, 134 S. Ct. at 754 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). A corporation is only "at home" in a forum where it is incorporated or has its principal place of business, in all but an "exceptional case." *Id.* at 760-62 & n.19; *Ranza*, 793 F.3d at 1069; *Hodjera v. BASF Catalysts LLC*, No. C17-48RSL, 2017 WL 3263717, at *2 (W.D. Wash. July 31, 2017). Thus, even a large corporation that operates—and records "sizable" sales—in many places "can scarcely be deemed at home in all of them," as that result would improperly convert "at home" into a "doing business" test. *Daimler AG*, 134 S. Ct. at 761-62 & n.20. Rather, a foreign corporation's affiliations with the forum must be "comparable to a domestic enterprise in that State" for it to be considered at home. *Id.* at 758 n.11. A plaintiff who invokes general jurisdiction "must meet an 'exacting standard' for the minimum contacts required," because of the "much broader" assertion of judicial authority the foreign defendant faces. *Ranza*, 793 F.3d at 1069 (quoting *CollegeSource, Inc.*, 653 F.3d at 1074).

There can be no reasonable debate that BP p.l.c. is not at home in Washington. As the County admits, BP p.l.c. is a "multinational, vertically integrated oil and gas company" that is "registered in England and Wales with its headquarters in London, England." (Compl. ¶ 12.) Nothing in the complaint would justify treating this as an "exceptional case," moreover. The County does not allege, for example, that Washington has become BP p.l.c.'s global nerve center, nor even that BP p.l.c. itself operates in Washington.[6]

Far from alleging facts that could establish that BP p.l.c. is at home in Washington, the complaint merely alleges that subsidiaries of BP p.l.c. have done or are doing business here,

[6] In the case the Supreme Court points to as "exemplif[ying]" the "exceptional case," a Philippines corporation was forced to cease operating in its home nation during the Japanese occupation in World War II, and its president moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's operations. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952); *see BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (discussing *Perkins*). General jurisdiction in Ohio over the foreign corporation was proper in these unusual circumstances because it effectively had moved its principal place of business there, if only temporarily, making Ohio "the center of the corporation's wartime activities." *Daimler AG*, 134 S. Ct. at 756 & n.8.

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precisely as the plaintiff in *Daimler AG* alleged. For example, the County alleges that subsidiaries of BP p.l.c. operate oil refineries and terminals; own and operate pipelines for transporting refined products; and market and sell natural gas and gasoline to Washington residents. (*Id.* ¶¶ 36-47.) Even imputing these subsidiaries' Washington business activities to BP p.l.c. (as the Court assumed *arguendo* in *Daimler AG*), they *at most* show that BP p.l.c. does substantial, continuous business in Washington, just as Daimler did in California, where it was the "largest supplier of luxury vehicles" with multiple California-based facilities, *see* 134 S. Ct. at 752, and just as BNSF Railway Company did in Montana, where its 2,000 workers and 2,000 miles of railroad track did not render it "at home," *see BNSF Ry. Co.*, 137 S. Ct. at 1559; *see also Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014) ("This is not such an exceptional case," where defendant had "no offices, staff, or other physical presence in California, and it [was] not licensed to do business in the state"). More is needed to render a foreign corporation at home. The complaint here provides nothing more.

The County has not met, and cannot meet, its "exacting" burden to show that BP p.l.c. is at home in Washington.

B. Nor Is BP p.l.c. Subject To Specific Jurisdiction In Washington For This Claim

In contrast with general jurisdiction, for a forum state to assert specific jurisdiction over a nonresident, "there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780 (quoting *Goodyear Dunlop Tires Operations*, 564 U.S. at 919). More specifically, "'the *suit*' must 'aris[e] out of or relat[e] to the defendant's contacts with the *forum*.'" *Id.* (quoting *Daimler AG*, 134 S. Ct. at 754). In accord with the Supreme Court's direction, the Ninth Circuit recognizes "three requirements for a court to exercise specific jurisdiction over a nonresident defendant":

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> (1) the defendant must either "purposefully direct his activities" toward the forum or "purposefully avail[] himself of the privileges of conducting activities in the forum"; (2) "the claim must be one which arises out of or relates to the defendant's forum-related activities"; and (3) "the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable."

Axiom Foods, Inc., 874 F.3d at 1068 (quoting *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)); *accord Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1142 (9th Cir. 2017). The plaintiff bears the burden of satisfying the first two prongs. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

Neither the second nor third requirement for exercising specific jurisdiction is met here.

1. The Claim Does Not Arise out of or Relate to BP p.l.c.'s Washington Activities, Even Imputing All Claim-Related Activities of Indirect Subsidiaries to BP p.l.c.

A claim arises out of or relates to the defendant's forum-related activities only if the plaintiff "would not have sustained her injury, 'but for'" that activity. *Doe v. Am. Nat'l Red Cross*, 112 F.3d 1048, 1051-52 (9th Cir. 1997); *Doe v. Unocal Corp.*, 248 F.3d 915, 924 (9th Cir. 2001) ("the Court considers whether [the] plaintiffs' claims would have arisen but for [the defendant]'s contacts with [the forum]"); *Vernon Johnson Family Ltd. P'ship v. Bank One Tex., N.A.*, 80 F. Supp. 2d 1127, 1133-34 (W.D. Wash. 2000) ("arises out of or relates to" prong requires plaintiffs to "establish that their cause of action would not have arisen 'but for' the [defendants'] contacts with Washington"). Under this "but-for" test, the plaintiff must show that other contributing forces would not still have produced his or her injury in the absence of the defendant's suit-related forum contacts. *Rashidi v. Veritiss, LLC*, No. 2:16-cv-04761-CAS (JPRx), 2016 WL 5219448, at *6 (C.D. Cal. Sept. 19, 2016); *see Dantonio v. S.W. Educ. Dev. Lab.*, No. C10–1193RSL, 2011 WL 2118577, at *6 (W.D. Wash. May 26, 2011) (plaintiff failed to support the links in the claimed causal chain to satisfy but-for causation test). Where the plaintiff does not show that the defendant's forum activities were a "necessary" cause of that injury, the requirement is not met. *Unocal Corp.*, 248 F.3d at 925; *accord Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781 (defendant's in-state activities did not

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cause the plaintiffs' alleged injuries; thus, no "adequate link" supported specific jurisdiction).

In *Doe v. Unocal Corp.*, for example, Burmese farmers alleged they suffered human rights violations at the hands of a French energy corporation (Total S.A.), among others, in furtherance of a gas pipeline project in Burma. *Id.* at 920. They claimed Total was subject to specific jurisdiction in California by virtue of Total's joint venture agreement with its co-venturer on the pipeline project, a California corporation (Unocal Corp.). The court held the plaintiffs had failed to meet their burden under the but-for test because they could not show that "the pipeline project would not have gone forward without Total's dealings with Unocal" in California. *Id.* at 925. Total's California contacts were, in short, "not necessary to the initiation of the project" that allegedly led to the plaintiffs' injuries. *Id.*

Where the defendant conducts business on a national or global scale, the plaintiff must show that the defendant's *forum* activities, in particular, were a but-for cause of its injuries. In *Hodjera*, 2017 WL 3263717, for example, the Court held that Honeywell was not subject to specific jurisdiction in Washington for a claim alleging mesothelioma from asbestos-containing products, even though Honeywell (through a predecessor) made brake components in Washington that contained asbestos to which the plaintiff was exposed, because the plaintiff's asbestos exposure occurred in Toronto. *Id.* at *2. Given these facts, the Court concluded that the plaintiff failed to establish that his "exposure would not have occurred 'but for' Honeywell's contacts with Washington." *Id.* *Hodjera* is in accord with the Supreme Court's more recent holding in *Bristol-Myers Squibb Co.*, that BMS could not be subjected to specific jurisdiction in California for injury claims involving its drug Plavix, brought by patients who obtained Plavix through sources outside of California. *See* 137 S. Ct. at 1778. Even though BMS sold almost 187 million Plavix pills in California, taking in more than $900 million, and employed 250 sales reps in California, the Court held that there was no "adequate link between the State and the nonresidents' claims," because the specific pills that injured the plaintiffs were not developed, made, labelled, packaged, or sold to them in California. *Id.* at

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1778, 1781. To permit jurisdiction over these claims merely because BMS also sold Plavix to patients in California would, the Court explained, "resemble[] a loose and spurious form of general jurisdiction" that could not be squared with its precedents. *Id.* at 1781.

Washington activities also fail the but-for test when actors other than the defendant contributed to the plaintiff's injury and the plaintiff cannot show that its injury would have been avoided but for the defendant's forum-related conduct. In *Terracom v. Valley National Bank*, 49 F.3d 555 (9th Cir. 1995), for example, the court held that a Kentucky bank's act of signing a "certificate of sufficiency" without properly investigating the financial strength of a payment bond surety for a California public works project was not a but-for cause of the plaintiff's (a construction subcontractor) injury because a third party, the federal officer who awarded the contract, had "the sole responsibility of determining the acceptability of an individual surety," considered factors other than the bank's certificate in his evaluation, and might have approved the surety even if the bank had not signed the certificate. *Id.* at 561. Put simply, an actor other than the bank contributed to the plaintiff's injury, making it impossible to say that the plaintiff's injury would not have arisen but for the bank's contacts with California. *Id.* Similarly, in *Doe v. American National Red Cross* the court held that the failure of a federal official charged with ensuring the safety of the blood supply to bar high-risk groups from donating blood, to publicize the risks of blood transfusions, and to encourage blood companies to implement certain blood safety tests was not a but-for cause of the plaintiff's injury because other actors had greater control over the flow of blood and blood products into the forum state. 112 F.3d at 1051-52 ("Therefore, it cannot be said that [the plaintiff] would not have sustained her injury, 'but for' [the official's] alleged misconduct.").

a. The complaint does not allege any BP p.l.c. Washington activities are a but-for cause of the County's claimed injury

Here, the County has not alleged, either factually or even in conclusory terms, that BP p.l.c.'s Washington activities are a but-for cause of the "global warming-induced sea level rise" it says is damaging its coastlines. Indeed, not only is the concept of but-for causation

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entirely missing from the complaint, but the County's allegations leave no doubt that its theory is that the alleged public nuisance and trespass resulted from *all* human contributions to increased greenhouse gas levels in the atmosphere, including but certainly not limited to the *worldwide* production of fossil fuels by defendants and others. (Compl. ¶¶ 12-14 (alleging BP p.l.c. is "a multinational, vertically integrated oil and gas company" that "is responsible for" all "past and current production and promotion of fossil fuel products" by all of "its subsidiaries"); *id.* ¶ 9 (each defendant is a "substantial contributor[] to the public nuisance of global warming" based on its global "cumulative production of fossil fuels").) As the district court observed in the Oakland and San Francisco cases, "greenhouse gases emanating from overseas sources are equally guilty (perhaps more so) of causing plaintiffs' harm" as are gases emanating from the consumption of defendants' fuels in the United States. *Cal. v. BP p.l.c.*, Nos. C 17-06011 WHA & C 17-06012 WHA, 2018 WL 1064293, at *4 (N.D. Cal. Feb. 27, 2018). But alleging that *all worldwide* fossil fuel production "substantially contributed" to the purported nuisance is a far stretch from alleging that *BP p.l.c.'s Washington* activities are a but-for cause of the nuisance. The County's causal theory is thus invalid under *Bristol-Myers Squibb Co.* and *Hodjera*, which teach that nationwide or global activities by a large corporation—even activities of the sort the plaintiff complains of—do not establish the requisite but-for causal link between the defendant's forum contacts and the plaintiff's injury.

Also negating the essential but-for causation is the complaint's allegation that innumerable other fossil fuel producers besides BP p.l.c. have contributed to the alleged nuisance. The County admits it has only sued a handful of the world's "largest cumulative producers of fossil fuels worldwide." (Compl. ¶ 99.b.) And it avers that global warming results not from the emissions attributable to any single producer's production, but rather because greenhouse gases from fossil fuels produced by *all* producers—defendant and non-defendant—combine in the global atmosphere where they cannot be physically traced to an individual producer. (*Id.* ¶ 161 ("emissions of greenhouse gases from the fossil fuels [each

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defendant] produces combines [sic] with the greenhouse gas emissions from fossil fuels produced by the other Defendants, *among others*, to result in dangerous levels of global warming") (emphasis added).) These allegations, too, are deficient to meet the County's burden to plead that BP p.l.c.'s Washington activities are a but-for cause of its claimed sea-level-rise harm, because, as in *Terracom* and *Doe v. American National Red Cross*, it cannot be said that contributions of actors other than BP p.l.c. would not have been sufficient to cause that harm in the absence of BP p.l.c.'s Washington activities.

In sum, the complaint alleges BP p.l.c., the other defendants, and myriad others, acting around the globe, have produced massive amounts of fossil fuels, yet nowhere alleges that the County "would not have sustained [its] injury" but for any BP p.l.c. Washington activities. *See Am. Nat'l Red Cross*, 112 F.3d at 1051-52. From all that appears in the complaint, the County's claimed injury would have occurred regardless of any BP p.l.c. contacts with Washington. The complaint accordingly fails to plead that the County's claims arise out of or relate to BP p.l.c.'s Washington activities.

b. The County's "attribution science" methodology furnishes no evidence that BP p.l.c.'s Washington contacts are a but-for cause of the claimed injuries

The County cannot meet its burden on this motion because, as shown, the complaint does not *plead* any jurisdictionally sufficient nexus between BP p.l.c.'s alleged in-state activity and the County's claimed injuries. If the County tries to overcome its pleading's deficiencies by turning to attribution science, that theory will not help it either. As explained above, those studies seek to estimate BP p.l.c.'s attributed share of emissions (i) based on its *worldwide production* of fossil fuels since the dawn of the Industrial Revolution, and (ii) without connecting those alleged *emissions* to the County's claimed sea-level-rise harms. (*Supra* pp. 5-7.) None of the oil or natural gas production imputed to BP p.l.c. in those studies occurred in Washington during the complaint's time period. (*Supra* pp. 6-7.) Indeed, because those studies purport to estimate a Carbon Major's emissions based exclusively on its historical

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production of fossil fuels, their methodology would conclude that BP p.l.c.'s contribution to global industrial emissions from Washington production during the complaint's time period, is *zero*. The studies thus furnish no evidence to establish the requisite causal link between BP p.l.c.'s Washington activities and the County's injuries. To the contrary, based on the County's allegations, the County's alleged injury would be no different regardless of any BP p.l.c. Washington contacts.

c. Permitting specific jurisdiction in the absence of any jurisdictionally relevant links with the forum would subject BP p.l.c. to jurisdiction in every state, a result that cannot be squared with recent Supreme Court decisions

As discussed above, in two recent decisions the Supreme Court made abundantly clear that large national or international businesses are not, by virtue of their sprawling operations, subject to jurisdiction everywhere on claims lacking an adequate causal nexus to their forum activities. First, in *Daimler AG*, the Court held that Daimler's extensive national vehicle distribution operations (which the Court imputed *arguendo* to Daimler), multiple California facilities, and California sales accounting for 2.4% of its worldwide sales, did not render Daimler "at home" in California because, were the law otherwise, "the same global reach would presumably be available in every other State in which MBUSA's sales are sizable" and would destroy foreign companies' ability to structure their operations to allow for reasonably predictable jurisdictional outcomes. 134 S. Ct. at 761-62. Then, in *Bristol-Myers Squibb Co.*, the Court held that BMS' sales of Plavix pills in every state, including over $900 million in California, which accounted for more than 1% of the company's nationwide sales revenue from all products, did not subject BMS to specific jurisdiction in California for claims by patients who obtained their medication outside California, because exercising specific jurisdiction in the absence of "any adequate link between the State and the nonresidents' claims" would "resemble[] a loose and spurious form of general jurisdiction." 137 S. Ct. at 1781.

Asserting jurisdiction over BP p.l.c. in this action would directly disregard the teachings of these controlling decisions, because it would effectively authorize specific

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jurisdiction everywhere. Subsidiaries of integrated global energy businesses such as these defendants operate around the nation and world. If this complaint sufficed to require BP p.l.c. to defend this claim in this Court, the same "global reach" would presumably be available everywhere, which would impermissibly "resemble[] a loose and spurious form of general jurisdiction" even broader than pre-*Daimler AG* cases allowed.

d. BP p.l.c.'s alleged downstream activities add nothing to this analysis

Unable to allege that subsidiaries of BP p.l.c. produced fossil fuels in Washington during the complaint's time period, the County is left to allege that subsidiaries transported, refined, marketed, or sold fossil fuels in the state. (Compl. ¶¶ 36-47.) These allegations of "downstream" forum activities cannot cure the County's inability to plead and prove necessary but-for causation, however, because the County has not alleged, either generally or factually, any but-for causal nexus between these activities and its claimed sea-level-rise harms. Attribution science does not furnish such a nexus, because it only posits a relationship between *production* of fossil fuels and emissions, not one between downstream activities (*e.g.*, refining, transporting, or selling fossil fuels) and emissions. Attribution science is, however, the County's only purported basis for assigning responsibility to defendants for emissions, global warming, or sea-level rise. The County has not alleged any theory that would assign responsibility for these climatic effects to participants in downstream activities in the fossil fuel business.[7]

Bristol-Myers Squibb Co. teaches that the only forum contacts relevant to specific jurisdiction analysis are those alleged to be *tortious and causative*. *See also Rice Aircraft Serv., Inc. v. Soars*, No. 2:14-cv-2878 MCE DB, 2018 WL 3203133, at *8-*10 (E.D. Cal. June 28, 2018). The specific conduct the County attacks here as tortious and causative is the

[7] Of course, the County claims its injuries are caused by global warming, which it says results from excessive worldwide *emissions* (Compl. ¶¶ 88-96) caused by consumers' (not defendants') worldwide combustion of fossil fuels (*id.* ¶ 10 (disclaiming intention to impose "liability on Defendants for their direct emissions").) The County's concession that mere production of fossil fuels—without combustion and emissions by others—could not and did not cause its alleged injuries confirms that the federal Clean Air Act displaces its claims, as shown in defendants' concurrently filed joint motion to dismiss for failure to state a claim.

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production and promotion of fossil fuels. As already shown, however, the County has not alleged and cannot establish that any production by BP p.l.c. in Washington caused its claimed injuries. Nontortious downstream contacts with the state add nothing to this analysis.

2. Exercising Jurisdiction over BP p.l.c. Would Be Unreasonable

Even if the first two requirements for specific jurisdiction are met, "in order to satisfy the Due Process Clause, the exercise of personal jurisdiction must be reasonable." *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998). To be reasonable, jurisdiction "must comport with 'fair play and substantial justice.'" *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)). The Ninth Circuit has identified several factors to be considered in addressing the question of reasonableness, some of which are "no longer weighed heavily." *Id.* at 1323-24 (noting reduced importance of "(5) the most efficient judicial resolution of the controversy" and "(6) the importance of the forum to the plaintiff's interest in convenient and effective relief").

The Supreme Court, meanwhile, instructs that the "primary concern" in determining whether jurisdiction is present is "the burden on the defendant." *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292). Relevant burdens include not only "the practical problems resulting from litigating in the forum," but also "the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Id.* Concern for the latter recognizes that restrictions on personal jurisdiction are in part "a consequence of territorial limitations on the power of the respective States" and nations. *Id.* These "federalism" and "comity" interests at times "may be decisive." *Id.* As the Court has explained, "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest

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the State of its power to render a valid judgment." *Id.* at 1780-81. These recent Supreme Court analyses effectively blend and elevate the importance of four of the Ninth Circuit's reasonableness factors: "(2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute"; and "(7) the existence of an alternative forum." *See Panavision Int'l, L.P.*, 141 F.3d at 1323.

Jurisdiction over BP p.l.c. would be unreasonable under all of these factors because using Washington or even U.S. common law to regulate *worldwide* fossil fuel production by hailing an English parent company that does not do business in the state into a Washington forum would elevate the state's sovereignty beyond any appropriate bounds. *See City of Oakland*, 2018 WL 3109726, at *7 ("[P]laintiffs would have a single judge or jury in California impose an abatement fund as a result of such overseas behavior [*i.e.*, production and sale of fossil fuels worldwide]. Because this relief would effectively allow plaintiffs [cities] to govern conduct and control energy policy on foreign soil, we must exercise great caution."); *City of N.Y. v. BP p.l.c.*, No. 18 Civ. 182 (JFK), 2018 WL 3475470, at *6, *21-*22 (S.D.N.Y. July 19, 2018) (to hold five international oil and gas companies liable for climate change based on worldwide fossil fuel production would pose "serious foreign policy consequences" and implicate "countless foreign governments and their laws and policies"). The state admittedly has an interest in protecting its coastal property. But the County's claims would reach all worldwide fossil fuel production by BP p.l.c. and the other defendants, and Washington has no greater interest in applying its own or U.S. tort law to that production than any other state or nation would. The sovereignty of UK courts with respect to this controversy, moreover, implies a limitation on the sovereignty of Washington courts, *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780, particularly as UK courts resist "uninhibited approach[es] to personal jurisdiction" that draw UK corporations into existential litigation in multiple fora, *Daimler AG*, 134 S. Ct. at 763.

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These concerns are real and practical, not merely theoretical. If jurisdiction were reasonable in this case, and this Court rendered a judgment effectively regulating defendants' worldwide fossil fuel production, thereby reshaping global energy policy, that exercise might then be repeated in the courts of every other state and nation that have similarly tenuous claims to jurisdiction over BP p.l.c., with innumerable conflicting outcomes. Washington does not have any unique interest in this claim involving conduct and alleged effects dispersed throughout the globe.

IV. CONCLUSION

For all the foregoing reasons, BP p.l.c. respectfully requests that the Court grant this motion and dismiss the complaint as against BP p.l.c. for lack of personal jurisdiction.

Dated: July 27, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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