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July 7, 2020

VIA U.S. MAIL & EMAIL

Honorable Videtta A. Brown
Circuit Court for Baltimore City
Courthouse East
111 N. Calvert Street, Room 205
Baltimore, MD 21202
Sameerah.mickey@mdcourts.gov

Re: *Mayor and City Council of Baltimore v. BP P.L.C., et al.*, No. 24-C-18-004219

Dear Judge Brown:

Defendant Chevron writes in response to Plaintiff's June 11, 2020, letter regarding the Ninth Circuit's decision in *City of Oakland v. BP plc*, 960 F.3d 570 (9th Cir. 2020). Contrary to Plaintiff's assertion, *Oakland* offers no "support[for] the City's position here that its claims are not governed by federal common law, preempted by the Clean Air Act, or otherwise barred by federal law." Pltf's Letter at 1. On the contrary, *Oakland* addressed only the federal jurisdictional question whether Plaintiff's claims, although pleaded under state law, were removable to federal court—a question not presently implicated here.

Defendants in *Oakland* argued that the plaintiffs' global climate change claims were necessarily governed by federal law and that the federal district court therefore "had federal-question jurisdiction under 28 U.S.C. § 1331" supporting removal from state court, even though the plaintiffs pleaded claims that expressly invoked only state law. *Id.* at 576. The Ninth Circuit, however, held that there were only "two exceptions to the well-pleaded-complaint rule," *Grable* and complete preemption, and rejected the district court's holding that federal common law provides an independent ground for removal. *Id.* at 580; *but see Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924 (5th Cir. 1997) (holding that state-law claims filed in state court were properly removed because they "ar[o]se[] under federal common law principles"). In doing so, the Ninth Circuit emphasized that actions "may *not* be removed to federal court on the basis of a federal defense, including the defense of preemption," 960 F.3d at 577, and expressly left the determination of federal defenses to the state court in the first instance, *see id.* at 580 n.6 ("We do not address whether [federal

interests] may give rise to an affirmative federal defense because such a defense is not grounds for federal jurisdiction.").

Oakland has no relevance here for two reasons. *First*, the *Oakland* panel addressed whether the plaintiffs' claims implicated federal common law in assessing whether those "claim[s] necessarily raise a stated federal issue, actually disputed and substantial," as an element of the state-law cause of action so as to support federal removal *jurisdiction* under *Grable*, not in assessing the *merits* of the plaintiffs' claims. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005); *see Oakland*, 960 F.3d at 578-81. The Ninth Circuit left open the possibility that any or all of the "federal interests" identified by the defendants could provide defenses on the merits. To be sure, the Ninth Circuit stated that "it is not clear that the claim requires an interpretation or application of federal law at all, because the Supreme Court has not yet determined that there is a federal common law of public nuisance relating to interstate pollution." 960 F.3d at 580. But as Defendants have shown, the U.S. Supreme Court has squarely held that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972). Notably, *Oakland* remains subject to further review on rehearing or certiorari.

Second, Plaintiff emphasizes that "[t]he Ninth Circuit also found no 'complete' preemption under the Clean Air Act." Pltf's Letter at 2. But that observation is irrelevant to this action because Defendants have not even *argued* complete preemption in this Court; rather they raise only ordinary preemption. As the Fourth Circuit has explained, "[c]omplete preemption and ordinary preemption on the merits 'are not as close kin jurisprudentially as their names suggest,'" for "complete preemption is a 'jurisdictional doctrine,' while 'ordinary preemption simply declares the primacy of federal law, regardless of the forum or the claim.'" *Johnson v. American Towers, LLC*, 781 F.3d 693, 702 (4th Cir. 2015). In other words, a state-law claim can be preempted (and thus fail on the merits) even if it is not *completely* preempted (and thus does not create federal jurisdiction). *See, e.g., Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 698 (2006) (holding that "even if FEHBA's preemption provision reaches contract-based reimbursement claims, that provision is not sufficiently broad to confer federal jurisdiction").

Accordingly, *Oakland* has no bearing on whether this Court can, and should, grant Defendants' motion to dismiss on the ground that Plaintiff's claims are displaced and/or preempted by the Clean Air Act.

Sincerely,

/s/ Theodore J. Boutrous, Jr.

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cc: All counsel of record (via email)