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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 Oakland City Attorney BARBARA J. PARKER,

Plaintiffs,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS COMPANY, a Delaware corporation, EXXON MOBIL CORPORATION, a New Jersey corporation, ROYAL DUTCH SHELL PLC, a public limited company of England and Wales, and DOES 1 through 10,

Defendants.

First Filed Case No. 3:17-cv-6011-WHA
Related to Case No. 3:17-cv-6012-WHA

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND

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 COMPANY, a Delaware corporation, EXXON MOBIL CORPORATION, a New Jersey corporation, ROYAL DUTCH SHELL PLC, a public limited company of England and Wales, and DOES 1 through 10, Defendants.	Case No. 3:17-cv-6012-WHA

I. INTRODUCTION

Defendants' Opposition to the People's Motion for Leave to Amend ("Opp.") does not satisfy any of the factors that could support denial of amendment under Rule 15. "Absent prejudice, or a strong showing of any of the remaining [relevant] factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend." *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Defendants have not presented any basis for overcoming that presumption.

The People seek to amend their complaints to withdraw their federal common law claim for relief, and to withdraw the City of Oakland and the City and County of San Francisco as plaintiffs in these actions. *See* 17-cv-6011, Dkt. 287; 17-cv-6012, Dkt. 343 ("Mot.") at 1–2. The People only added that claim and those parties to conform to the Court's remand ruling that the complaint could either proceed under federal common law or not at all. *Id.* at 3. Now that the Ninth Circuit has reversed the prior remand ruling, the People seek to proceed solely on the state law claims that they originally filed. *Id.* at 2, 4. Removing the federal claims and City plaintiffs is a reasonable, common sense request, and will not create any complications or inefficiencies in this action. *Id.* at 6.

Defendants argue that leave should be denied because amendment is "unnecessary," Opp. 3:9, ignoring that leave to amend should be "freely given," Fed. R. Civ. P. 15(a), and that motions to amend should be treated "with extreme liberality." *Eminence Cap.*, 316 F.3d at 1051. While Defendants contend that the People "were under no obligation" to plead a federal common law claim, Opp. 3:28–4:1, that is no reason to prohibit a plaintiff from withdrawing a claim it chooses not to pursue, especially this early in the proceedings. Defendants do not dispute that the People offered the prior amendment solely to conform to the Court's now-reversed remand order without waiving their position that this case should proceed in California state court under California state law only.

Defendants suggest that the Court may lack jurisdiction to grant leave to amend, because it has not yet ruled on the People's renewed motion to remand. Opp. 4. But although a federal court must "satisfy itself of its jurisdiction over the subject matter before it considers the *merits* of a

case," *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999), courts have ample authority to resolve non-merits issues before determining jurisdiction, and can even dismiss a case on discretionary or abstention grounds before determining their own jurisdiction, *id.* at 585.

Notably, Defendants have not even attempted to make a showing of bad faith, prejudice, undue delay, or futility—the usual grounds for opposing amendment. Given the liberal standards governing amendment under Rule 15, the absence of any prejudice to Defendants, and the judicial efficiency interests that will be furthered by allowing the People to withdraw an extraneous claim they no longer have any need to preserve, the Court should grant the pending motion. Rule 15 requires no less. The People will then each proceed on a Second Amended Complaint that (1) withdraws the federal common law claims added in the First Amended Complaints and (2) withdraws the two municipal plaintiffs (the City of Oakland and the City and County of San Francisco) that were added solely with respect to the federal common law claims.

II. ARGUMENT

A. Defendants' suggestion that the People timed their motion to prejudice Defendants' certiorari petition misstates the facts and does not establish prejudice.

Defendants begin with the speculative accusation that the People's true motive for moving to amend the complaint is not for the reasons stated in the motion, but "to manufacture a basis on which to argue that the Supreme Court should deny" Defendants' petition for certiorari. Opp. 1–2. That is obviously untrue, as demonstrated by the long history of communications between the parties and with the Court concerning the nature and timing of the People's proposed amendment.

The People first informed this Court of their intent to withdraw the federal common law claims and the two municipal entities pleading those claims at the status conference on December 16, 2020, more than three weeks *before* Defendants filed their petition for certiorari. *See* Tr. of Dec. 16, 2020 Status Conference, Declaration of Matthew K. Edling ("Edling Decl."), Ex. 1 at 6:14–20 ("The People also would like to file a motion to amend the complaint for the simple purpose of withdrawing the federal common law allegations that we added in response to your previous order and to revert to our original complaint. We had requested that defendants stipulate, but defendants are not willing to."). Indeed, as the People's counsel explained at that conference,

they had first requested Defendants' consent to that amendment more than *two months* earlier. *See* Sept. 18, 2020 Email from Matthew K. Edling to Joshua D. Dick, Edling Decl. at i, 1, 2, 3, 4 (attaching proposed joint administrative motion to set status conference and schedule briefing on, *inter alia*, "amendment of the People's complaint to withdraw their claims under federal common law"). The motion is not some last-minute ploy by Plaintiffs' counsel tied to the filing of Defendants' certiorari petition. It was in fact counsel *for Defendants*, not for the People, who first proposed a briefing schedule that would delay the filing of this motion to amend until after Defendants' deadline for filing their certiorari petition. *See* Edling Decl. Ex. 1 at 17:15–18:2 ("MR. BOUTROS: . . . I was going to propose kind of simultaneous supplemental briefing where we file at the same time, and I was going to propose January 26."); *id.* at 20:5–13 ("THE COURT: All right. So the opening brief to remand on a—renewed motion to remand, did you say January—let's keep it on a Thursday. January 28. . . . MR. BOUTROS: I think I said twenty—this is Mr. Boutros—26, but the 28th would be— THE COURT: Well, I like to keep them on Thursdays.").

Besides, Defendants acknowledge that granting leave to amend "would not in fact preclude the Supreme Court from resolving the question presented" in their certiorari petition. Opp. 2:5–6. Consequently, the only prejudice Defendants assert is the puzzling contention that permitting withdrawal of the now-extraneous federal common law claim would "sow confusion" and "require Defendants (and the Court) to waste resources." *Id.* at 1:4, 2:15. But the People are *eliminating* a claim and the parties that assert it, not *adding* claims or parties. Even if that were not the case, it is well-settled that "allegations that an amendment will require the expenditure of some additional time, effort, or money do not constitute undue prejudice." *Bridgeport Music, Inc. v. Universal Music Grp., Inc.*, 248 F.R.D. 408, 414 (S.D.N.Y. 2008) (quoting *Randolph–Rand Corp. of N.Y. v. Tidy Handbags, Inc.*, No. 96 Civ. 1829, 2001 WL 1286989, at *4 (S.D.N.Y. Oct. 24, 2001)).

B. Defendants' argument that leave to amend should be denied because amendment may allow the People to "avoid an adverse judgment on the merits" is nonsensical.

Defendants' second argument, that granting leave to amend would prejudice them "to the extent it seeks to avoid an adverse judgment on the merits," Opp. 2:17–18, makes no sense. Defendants appear to argue that because the Ninth Circuit vacated this Court's dismissal of the

People's federal common law claim, the People must be required to keep that claim in the complaint so the Court can dismiss it again if, as Defendants urge, the Court denies the People's renewed motion to remand. *See id.* at 2:18–28. That makes no practical sense. Either way, the federal common law claim would not proceed. And of course, it would be *less* prejudicial, not more, to allow that claim to be withdrawn now through amendment rather than requiring briefing and argument on a potential future motion to dismiss a federal common law claim that the People have no interest in pursuing.

Defendants cite no authority in support of their prejudice argument, and the People have found none. The Court should grant the People leave to withdraw the federal common law claim because "[t]o do otherwise would be to force plaintiff[s] to litigate a federal claim which [they] now do[] not wish to litigate (and, of course, require defendant[s] to defend a claim which plaintiff[s] choose[] not to pursue)." *Austwick v. Bd. of Educ. of Twp. High Sch. Dist. No. 113, Lake Cty.*, 555 F. Supp. 840, 842 (N.D. Ill. 1983) (denying motion to remand but granting plaintiff leave to voluntarily dismiss federal claims).

C. Defendants provide no support for their conclusory statement that amendment would be dilatory and futile.

Defendants' next argument, which they present under the heading that amendment would be "dilatory and futile," Opp. 3:1, discusses neither delay *nor* futility. Defendants instead merely assert that People's first amendment was "not *required*," and that the proposed amendment is "unnecessary." *Id.* at 3:3, 3:9, 3:13–14 (emphasis added). It is unclear what element of the Rule 15 analysis this argument might support. Defendants do not contend they would be prejudiced by the proposed amendment, or that the People are proceeding in bad faith, or that amendment would be futile, or that the People have been dilatory. Leave to amend should be given "with extreme liberality," *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001), with "all inferences in favor of granting the motion," *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). Defendants' suggestion that leave should be denied if amendment is not *required* turns Rule 15 precedent on its head.

D. Defendants' argument that leave to withdraw the People's federal common law claim should be denied because the People were not "obligat[ed]" to plead that claim does not establish prejudice.

Defendants next argue that the People "were under no obligation" to plead a federal common law claim and therefore should not be permitted to withdraw that claim and "alter their strategy midstream." Opp. 3:28–4:2. But every proposed amendment under Rule 15, to some extent, reflects a change in strategy, focus, or theory, and here the People are simply withdrawing a claim that is no longer necessary in light of the interim Ninth Circuit ruling.

Even in cases where, unlike here, a plaintiff pleads federal claims in state court in the first instance, the Ninth Circuit has held that there is "nothing manipulative about th[e] straight-forward tactical decision" to abandon those claims after removal, either to avoid federal jurisdiction or to avoid dismissal on the merits. *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 491 (9th Cir. 1995). A plaintiff may always "choose between federal claims and a state forum" and the district court may elect not to exercise supplemental jurisdiction once all federal claims have been dismissed. *See id.* (reversing award of fees against plaintiff, in part because "[f]iling federal claims in state court is a legitimate tactical decision by the plaintiff: it is an offer to the defendant to litigate the federal claims in state court"). Defendants cite *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989), for the proposition that "discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." But the district court in *Ascon* had dismissed the original complaint without prejudice, "explaining in detail the bases for its dismissal," *id.*, and only denied leave to amend a second time on futility grounds after the plaintiff's first amended complaint suffered the same deficiencies. There is no merit to Defendants' suggestion that *withdrawing* a claim is at all prejudicial or futile, let alone so prejudicial that leave to amend should be denied, especially where, as here, the case has not progressed past the pleadings and there has been no discovery.

E. Defendants provide no support for their argument that the court lacks jurisdiction to grant leave to amend.

Finally, Defendants ask the Court to defer ruling on this motion until after the Supreme Court rules in *BP P.L.C. v. Mayor and City Council of Baltimore*, No. 19-1189 (U.S.) (argued Jan.

19, 2021), and after this Court rules on the People's renewed motion to remand. No purpose would be served by such delay. First, while Defendants are correct that federal courts "may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)," *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007), courts may still resolve nonmerits issues that "mak[e] no assumption of law-declaring power," *Ruhrgas AG*, 526 U.S. at 584. Defendants cite no authority supporting their contention that the Court is precluded from granting leave to amend a complaint until after it has established jurisdiction, and the People are not aware of any. If Defendants were correct, a district court could never, for example, grant a plaintiff leave to amend under Rule 15(a) to correct defective jurisdictional allegations while a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) is pending. That is the opposite of established law, which holds that "[w]hen necessary to establish jurisdiction[,] leave to amend should be freely granted under Fed. R. Civ. Pro. 15(a)." *Loc. 179, United Textile Workers of Am., AFL-CIO v. Fed. Paper Stock Co.*, 461 F.2d 849, 851 (8th Cir. 1972).

Second, Defendants' request for further delay undermines their argument that the motion prejudices them because it is "dilatory" and because they "have already spent three years ascertaining jurisdiction." Opp. 3:1, 3:15–16. The People's motion is neither too early nor too late. The only reason this case has been pending for more than three years is because of Defendants' improper efforts to force the People to litigate their exclusively California state law claims in federal rather than state court.

III. CONCLUSION

For the reasons stated, the Court should grant the motion and permit the People to file the proposed Second Amended Complaints.

Dated: March 18, 2021

Respectfully submitted,

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