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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CITY OF HOBOKEN,

Plaintiff,

-against-

EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, AMERICAN PETROLEUM INSTITUTE,

Defendants.

Civil Action No. 2:20-cv-14243

Plaintiff's Memorandum in Opposition to Defendants' Motion to Strike

Defendants' submission—styled a "motion to strike"—identifies no infirmity in Plaintiff's Reply in support of its motion to remand.[1] Plaintiff agrees with Defendants that "a reply brief is limited in scope and must respond only 'to matters either raised by the opposition or unforeseen at the time of the original motion.'" *Ponzini v. Monroe Cty.*, No. 11 Civ. 413, 2015 WL 5123680, at *7 (M.D. Pa. Aug. 31, 2015) (quoting *Burnham v. City of Rohnert Park*, No. 92 Civ. 1439, 1992 WL 672965, at *5 (N.D. Cal. May 18, 1992)). All of the issues identified by Defendants as being improperly raised for the first time in Reply were in fact raised in Plaintiff's opening brief or became evident for the first time upon filing of the Opposition.

Plaintiff *did* have a basis to seek statutory costs under 28 U.S.C. § 1447(c) at the time it filed its motion to remand. Defendants had lost the very same arguments they make here a dozen times before. Indeed, Plaintiff had a basis to seek sanctions based on Defendants' miscitation and sanctionable failure to identify and (try to) distinguish controlling authority. Plaintiff refrained, however, from seeking that relief in its opening brief, but identified Defendants' failures and gave them an opportunity to cure them in the Opposition.

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[1] Footnote 1 of Defendants' Motion to Strike seeks to reserve rights they have already waived. *See* Oct. 20, 2020 Stipulation & Order, ECF No. 40, at 2 ("Defendants acknowledge that they have been properly served in this action and/or waive any defense or objection based on allegations of inadequate service of process.").

Defendants did not accept that invitation. Their Opposition instead included two untimely-filed expert reports and over 1,200 pages of new exhibits. *See* Reply, ECF No. 101, at 30. Defendants did not submit these expert reports and exhibits, which they acknowledge are "extensive," Motion to Strike, ECF No. 106-1, at 4 n.3, and "materially expanded [the] evidentiary record," Opposition, ECF. No. 100, at 4, with their Notice of Removal. Nor did they give any indication they planned to do so before filing their Opposition.[2] Plaintiff could not, obviously, have sought relief from the Court in its moving brief based on events that had not yet transpired.

Not only did Defendants not retract their sanctionable misuse of controlling authority, they doubled-down in the Opposition. *See* Reply, ECF No. 101, at 22 (discussing Defendants' misuse of *Federated Dep 't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) and *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981));

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[2] A motion to strike made in a reply brief is a sur-reply under Local Rule 7.1(d)(6), which provides that "[n]o sur-replies are permitted without permission of the Judge or Magistrate Judge to whom the case is assigned." *See Fameco Real Estate, L.P. v. Bennett*, No. 12 Civ. 6102, 2013 WL 1903490, at *2 n.2 (D.N.J. May 7, 2013). Defendants did not seek permission from the Court to file these papers; hence, their motion is improper and can be denied on that basis alone. *Id.*; *Colmer v. ICCS Co., LLC*, No. 08 Civ. 2737, 2009 WL 2382222, at *2 (D.N.J. July 30, 2009). Their failure precludes the Court from considering their argument, made in a footnote, that the the removal statute permits their filing of two expert reports and numerous exhibits for the first time with their opposition brief. *See* Defs' Br. at 4 n.3. Any such argument should have been made prior to or at the time of the infusion of a thousand pages of new material into the record, not belatedly after that filing was shown to be improper.

id. at 27 (Defendants' misquotation of Justice Alito's dissent in *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344 (2019) and this Court's decision in *Ortiz v. Univ. of Med. & Dentistry of New Jersey*, No. 08 Civ. 2669, 2009 WL 737046 (D.N.J. Mar. 18, 2009)). The one concession made in the Opposition only underlined the poverty of the removal. Defendants *abandoned* Complete Preemption as a basis for removal without acknowledging that that basis had been frivolously brought in the first place and contradicted binding Third Circuit authority. Plaintiff had devoted seven pages of its remand motion to that ground, Remand Motion, ECF No. 94, at 10-17 (noting, inter alia, that *Bell v. Cheswisk Generating Station*, 734 F.3d 188 (3d Cir. 2013) had rejected Clean Air Act preemption), and could not have predicted this *volte face*. Plaintiff's request for costs in the Reply was fully justified by the content of the Opposition; to deny it that right would be to condone Defendants' improper use of their Opposition and the removal statutes.[3] *See Great Lakes Reinsurance (UK) PLC v. Kranig*, No. 11 Civ. 122, 2013 WL 2631861, at *11 n.15 (D.V.I. June 12, 2013); *Aguirre v. Munk*, No. 09 Civ. 763, 2011 WL 2149087, at *13 (N.D. Cal. June 1, 2011).

Defendants' complaint regarding Plaintiff's collateral estoppel argument is

[3] In fact, as Plaintiff noted, Defendants have recently and vociferously argued, after the filing of the remand motion in this case, that sanctions and statutory costs are the proper mechanism to remedy such frivolous removal practices. *See* Reply, ECF No. 101, at 35 (quoting Reply of Petitioners, *BP P.L.C.. v. Mayor & City Council of Baltimore*, No. 19-1189, 2021 WL 130103, at * 16 (U.S. Jan. 8, 2021).

also without basis because Defendants were on notice of Plaintiff's position that the dozen cases they have already lost are determinative of the outcome in this case. Defendants knew they lost these cases, on identical grounds, and yet they neither cited nor distinguished them once in their Notice of Removal, and barely attempted to distinguish them in their Opposition. Defendants are barred from re-litigating removal based on their own strategic choices in this and every other climate change litigation they have been involved in. Their conduct has shown *exactly* why the doctrine of collateral estoppel exists. Although Plaintiff can—and should—win its motion solely on this count, it does not need to and does not wish to give Defendants yet another excuse to delay consideration of the merits of this dispute in state court. Plaintiff thus clarifies that it is not seeking the Court's order to remand solely on the basis of collateral estoppel.

CONCLUSION

Defendants don't get a second bite at that apple by claiming, bizarrely, that Plaintiff is seeking to "deprive Defendants of the opportunity to respond," Motion to Strike, ECF No. 106-1, at 1, to arguments Defendants themselves inserted into their Opposition or, instead, decided to ignore in that Opposition. Defendants' motion to strike should be denied.

Dated: April 6, 2021

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