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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through Oakland City Attorney BARBARA J. PARKER,

Plaintiff and Real Party in Interest,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS COMPANY, 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.

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

DEFENDANTS' REPLY TO PLAINTIFFS' SUPPLEMENTAL BRIEF ON NAVIGABLE WATERS OF THE UNITED STATES

Case No. 3:17-cv-6011-WHA

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THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the San Francisco City Attorney DENNIS J. HERRERA,

Plaintiff and Real Party in Interest,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS COMPANY, 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-6012-WHA

[*Additional Counsel Listed on Signature Page*]

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DEFENDANTS' REPLY TO PLAINTIFFS' SUPPLEMENTAL BRIEF

As explained in Defendants' Supplemental Brief, there are numerous ways in which the close connection between Plaintiffs' claims and the navigable waters of the United States gives rise to federal jurisdiction: Plaintiffs ask the Court to regulate waters governed by federal common law, to interpret federal laws concerning the management of navigable waters, to second-guess decisions made by federal entities with exclusive jurisdiction over such waters, and to act in an area subject to federal admiralty jurisdiction. *See* ECF No. 129. Yet Plaintiffs address only the last of these issues, arguing that there is no admiralty jurisdiction here because this case has no connection to maritime activities and because a clause "saving to suitors . . . all other remedies" in fact ensures a state *forum*. These arguments should be rejected. Federal district courts have original jurisdiction over cases, like this one, that involve alleged torts on navigable waters, 28 U.S.C. § 1333, and Defendants may remove any case "of which the district courts of the United States have original jurisdiction," *id.* § 1441(a).

A. The Court Need Not Address Plaintiffs' Admiralty Jurisdiction Arguments Because There Are Numerous Other Grounds for Finding Jurisdiction.

In light of the numerous other, independent grounds for federal jurisdiction, the Court need not reach Plaintiffs' arguments. For example, Plaintiffs' claims arise under federal common law because they allege pollution to air and water on an inherently global level that requires federal standards and, in addition, they raise disputed and substantial federal issues inasmuch as they collaterally attack federal decisions concerning foreign policy, national and international commerce, and more. The close connection between Plaintiffs' claims and the navigable waters of the United States also provides a basis for federal jurisdiction because the Army Corps of Engineers has taken, and is continuing to take, measures to mitigate the impact of climate change along the California coast, and has exclusive jurisdiction over whether Plaintiffs' proposed abatement measures are available.

B. The Court May Consider All Arguments Raised in Plaintiffs' Supplemental Briefing.

Although this Court ordered the parties to "address[] the 'navigable waters of the United States' as that concept relates to the removal jurisdiction issue in this case," ECF No. 127 at 1, Plaintiffs insist that this Court has no authority to consider that issue because the "Notice of Removal cannot be amended to add a separate basis for removal jurisdiction after the thirty day period" for filing a

1 notice of removal has elapsed, ECF No. 130 at 8–9. But Defendants have *not* sought to amend their
2 Notice of Removal. Rather, the Court has exercised its independent duty to satisfy itself of its juris-
3 diction, and it may do so on any basis supported by the record. *See Blue v. Craig*, 505 F.2d 830, 844
4 (4th Cir. 1974) ("Even where a complainant has incorrectly planted his case on one federal right, he
5 is still entitled to maintain his action if jurisdiction can be sustained on any other ground appearing in
6 the record."); *see also Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1230 (9th Cir. 2012) ("The propriety of
7 removal is determined solely on the basis of the pleadings filed in state court."). Plaintiffs' cases to
8 the contrary did not involve an order for supplemental briefing, and stand only for the proposition
9 that a court is not *required* to consider new jurisdictional grounds. *See* ECF No. 130 at 8–9.

10 It is especially appropriate for the Court to exercise its discretion to consider alternative bases
11 for jurisdiction here because doing so would "foster[] respectful, harmonious relations between the
12 state and federal judiciaries." *Wood v. Milyard*, 566 U.S. 463, 471 (2012) (observing that a court
13 may raise an exhaustion defense in habeas proceedings even where the argument was not raised by
14 the State). So long as the parties have "fair notice and an opportunity to present their positions," this
15 is a proper basis for decision. *Day v. McDonough*, 547 U.S. 198, 210 (2006); *see also United States*
16 *v. Salman*, 792 F.3d 1087, 1090 (9th Cir. 2015) (reaching an issue not raised in principal brief be-
17 cause "both parties . . . had a full opportunity to brief th[e] issue" in supplemental briefing).

18 **C. This Case Falls Within the Court's Admiralty Jurisdiction.**

19 Federal courts have jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction."
20 28 U.S.C. § 1333(1). "[A] party seeking to invoke federal admiralty jurisdiction . . . must satisfy con-
21 ditions both of location and of connection with maritime activity." *Jerome B. Grubart, Inc. v. Great*
22 *Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

23 *The Location Test.* The location tests asks "whether the tort occurred on navigable water or
24 whether injury suffered on land was caused by a vessel on navigable water." *Id.* Here, both of these
25 independent grounds are satisfied.

26 First, Plaintiffs allege a tort "that occurred on navigable water." *Id.* Plaintiffs contend other-
27 wise, asserting that "the People allege injuries on lands threatened by extraordinary flooding and sea
28 level rise." ECF No. 130 at 2. But this is only half true. In fact, Plaintiffs expressly allege injuries to

the Ports of Oakland and San Francisco. *See* Oak. Compl. ¶ 9 ("[P]rojected sea level rise in Oakland . . . could 'substantially impact costal areas' including . . . the Port [of Oakland]."); S.F. Compl. ¶ 90 ("San Francisco faces other ongoing and likely injuries as a result of sea level rise, including threats to Port infrastructure and operations . . . ."). These Ports fall within the Court's admiralty jurisdiction. *See Red Shield Ins. Co. v. Barnhill Marina & Boatyard, Inc.*, No. 08-cv-2900-WHA, 2009 WL 1458022, at *1 (N.D. Cal. May 21, 2009) ("The marina is located on the navigable waters of San Francisco Bay so this action falls under our admiralty jurisdiction and maritime law applies.").

Second, Plaintiffs' claims involve "injury suffered on land . . . caused by a vessel on navigable water." *Grubart*, 513 U.S. at 534. Plaintiffs assert that "drilling platforms are not vessels," ECF No. 130 at 2, but the case they cite involved "artificial island drilling rigs," *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 352 (1969). Some of Defendants' subsidiaries' activities occur on floating rigs, *see* ECF 89 at 30, and unlike the fixed structures in *Rodrigue*, "[f]loating structures have been treated as vessels by the lower courts." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 417 n.2 (1985).

The Connection Test. The connection test first asks "whether the incident has a potentially disruptive impact on maritime commerce," and then "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Grubart*, 513 U.S. at 534 (quotation marks omitted). Notably, Plaintiffs do not dispute the disruptive effect of climate change on maritime commerce. *See* ECF No. 130 at 3. Instead, they assert only that Defendants' "activity does not bear a 'substantial relationship to traditional maritime activity'" because it is not "'so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand.'" *Id.* (citing *Grubart*, 513 U.S. at 539–40).

The Ninth Circuit has acknowledged that "virtually every activity involving a vessel on navigable waters would be a traditional maritime activity sufficient to invoke maritime jurisdiction." *Taghadomi v. United States*, 401 F.3d 1080, 1087 (9th Cir. 2005). Because Plaintiffs allege that Defendants' extraction and sale of fossil fuels has caused sea level rise, and some of that extraction has occurred on vessels on navigable waters, the connection test is satisfied here under black-letter law.

Plaintiffs advance two counter-arguments. First, they characterize their claims as concerning

1 the "promotion and production of fossil fuels," which they contend "bear[s] no relationship . . . to tra-
2 ditional maritime activities." ECF No. 130 at 3. But an alleged tortfeasor's activity can always "be
3 described at a sufficiently high level of generality to eliminate any hint of maritime jurisdiction."
4 *Grubart*, 513 U.S. at 541–42. For that reason, courts have clarified that "[t]he activity at issue . . . is
5 not merely the event immediately surrounding the injury; it is the behavior of any 'putative tortfea-
6 sor[]' . . . that is an 'arguably proximate cause[]' of the injury." *Taghadomi*, 401 F.3d at 1087. Here,
7 Plaintiffs have sought to allege that Defendants' worldwide conduct, including extraction of fossil
8 fuels by vessels on navigable waters, is an "arguably proximate cause" of their alleged injury. And
9 Plaintiffs' contention that this activity lacks an adequate connection to maritime activity because fos-
10 sil fuel extraction "is an activity that can and does occur everywhere, on land as well as water" does
11 not withstand scrutiny. ECF No. 130 at 3–4. After all, an accident involving a cargo ship does not
12 escape admiralty jurisdiction simply because commercial goods are *also* shipped on land and by air.

13 Second, Plaintiffs contend that any maritime activity "is not a proximate cause of the People's
14 injuries" because "Defendants' overall fossil fuel production occurs predominantly *outside* navigable
15 waters." ECF No. 130 at 4. Of course, *none* of Defendants' conduct is a proximate cause of climate
16 change, but that is a merits question. "Normal practice permits a party to establish jurisdiction at the
17 outset of a case by means of a nonfrivolous assertion of jurisdictional elements," *Grubart*, 513 U.S. at
18 537, and here Plaintiffs have sought to assert that Defendants' subsidiaries' conduct—including ex-
19 traction of fossil fuels—proximately caused their injuries. *Cf. In re Katrina Canal Breaches Litig.*,
20 324 F. App'x 370 (5th Cir. 2009) (no admiralty jurisdiction where, unlike here, a project implicated
21 "only local, land-based interests" such that any admiralty connection was "wholly fortuitous").

22 **D. The "Saving to Suitors" Clause Does Not Preclude Federal Jurisdiction.**

23 "[A]ny civil action brought in a State court of which the district courts of the United States
24 have original jurisdiction, may be removed[.]" 28 U.S.C. § 1441(a). And "district courts shall have
25 original jurisdiction . . . of (1) [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors
26 in all cases all other remedies to which they are otherwise entitled." *Id.* § 1333. Because this case
27 falls within the Court's admiralty jurisdiction, it is removable. The inquiry need not proceed further:
28 "In construing the provisions of a statute, our inquiry begins with the statutory text, and ends there as

1 well if the text is unambiguous." *Visendi v. Bank of Am., N.A.*, 733 F.3d 863, 868 (9th Cir. 2013).
2 Plaintiffs disagree, noting that "even if these cases arose in admiralty, there would be no ex-
3 clusive federal jurisdiction" because their claims are *in personam* rather than *in rem*. ECF No. 130 at
4 5. This is irrelevant. Defendants do not assert that the Court has *exclusive* jurisdiction over this ac-
5 tion—only that it has *original* jurisdiction. That is all that the plain language of § 1441 requires.
6 To be sure, § 1441 was once more restrictive, requiring complete diversity for removal of *in*
7 *personam* admiralty claims. But Congress rescinded this requirement in the Federal Courts Jurisdic-
8 tion and Venue Clarification Act of 2011 ("VCA"), Pub. L. No. 112-63. As the Seventh Circuit has
9 held, "[t]his amendment limits the ban on removal by a home-state defendant to suits under the diver-
10 sity jurisdiction." *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 817 (7th Cir. 2015).
11 Plaintiffs argue that, notwithstanding the removal statute, "the 'saving to suitors' language in
12 section 1331(1) *forbids* removal of all *in personam* admiralty and maritime claims, except when there
13 is some other basis for jurisdiction." ECF No. 130 at 5 (emphasis added). But that clause only saves
14 *remedies*—it says nothing about *jurisdiction*, as the Fifth Circuit has emphasized: "The 'saving to
15 suitors' clause does no more than preserve the right of maritime suitors to pursue nonmaritime *reme-*
16 *dies*. It does not guarantee them a nonfederal *forum*[.]" *Tenn. Gas Pipelines v. Hous. Cas. Ins. Co.*,
17 87 F.3d 150, 153 (5th Cir. 1996). And while *Lu Junhong* acknowledged that "[p]erhaps it would be
18 possible to argue that the saving-to-suitors clause itself forbids removal," it "d[id] not think that it is
19 the sort of contention about subject-matter jurisdiction that a federal court must resolve even if the
20 parties disregard it," and therefore concluded that it had jurisdiction. 792 F.3d at 818.
21 Although Plaintiffs cite numerous district court cases to support their position—many predat-
22 ing the VCA—they never attempt to justify the circuit split they ask the Court to create. "[A]bsent a
23 strong reason to do so, [the Court] will not create a direct conflict with other circuits." *United States*
24 *v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987). There is no "strong reason" here.
25 **CONCLUSION**
26 For these reasons and those enumerated in Defendants' Notice of Removal, Opposition Brief,
27 and Supplemental Brief, Plaintiffs' motion to remand should be denied.
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** Pursuant to Civ. L.R. 5-1(i)(3), the electronic signatory has obtained approval from this signatory