ARNOLD & PORTER KAYE SCHOLER LLP
Jonathan W. Hughes (SBN 186829)
jonathan.hughes@arnoldporter.com
Three Embarcadero Center, 10th Floor
San Francisco, California 94111-4024
Telephone: 1 415.471.3100
Facsimile: 1 415.471.3400

ARNOLD & PORTER KAYE SCHOLER LLP
Matthew T. Heartney (SBN 123516)
matthew.heartney@arnoldporter.com
John D. Lombardo (SBN 187142)
john.lombardo@arnoldporter.com
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844
Telephone: 1 213.243.4000
Facsimile: 1 213.243.4199

ARNOLD & PORTER KAYE SCHOLER LLP
Philip H. Curtis (*pro hac vice*)
philip.curtis@arnoldporter.com
Nancy Milburn (*pro hac vice*)
nancy.milburn@arnoldporter.com
250 West 55th Street
New York, New York 10019-9710
Telephone: 1 212.836.8000
Facsimile: 1 212.836.8689

Attorneys for Defendant BP p.l.c.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the 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: 3:17-cv-06011-WHA
Related Case: 3:17-cv-06012-WHA

Case No. 3:17-cv-06011-WHA

**DEFENDANT BP P.L.C.'S NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

[Fed. R. Civ. P. 12(b)(2)]

Date: TBD
Time: TBD
Courtroom: 12

Judge: Honorable William H. Alsup

| THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the San Francisco City Attorney DENNIS J. HERRERA,<br><br>Plaintiff and Real Party in Interest,<br><br>v.<br><br>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,<br><br>Defendants. | Case No. 3:17-cv-06012-WHA |
|---|---|

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

## TABLE OF CONTENTS

**Page**

NOTICE OF MOTION AND MOTION TO DISMISS ........ 1

MEMORANDUM OF POINTS AND AUTHORITIES ........ 2

Introduction ........ 2

Background ........ 4

A. The Cities' Claim ........ 4

B. BP p.l.c.'s Lack Of Forum Contacts ........ 4

C. How The Cities May Estimate BP p.l.c.'s Purported Contribution To The Nuisance ........ 6

Argument ........ 9

THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION OVER BP P.L.C. ........ 9

A. BP p.l.c. Is Not "At Home" (And Thus Subject To General Jurisdiction) In California ........ 10

B. Nor Is BP p.l.c. Subject To Specific Jurisdiction In California For This Claim ........ 12

1. The Claim Does Not Arise out of or Relate to BP p.l.c.'s California Activities, Even Imputing All Claim-Related Activities of Indirect Subsidiaries to BP p.l.c. ........ 13

a. The complaint does not allege BP p.l.c.'s California activities are a but-for cause of the Cities' claimed injury ........ 15

b. If the Cities rely on "attribution science," that methodology likewise suggests that BP p.l.c.'s California contacts are not a but-for cause of the claimed injury ........ 17

c. Permitting specific jurisdiction on the basis of these tenuous 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 ........ 18

d. BP p.l.c.'s other alleged California connections add nothing to this analysis ........ 19

2. Allegations About Other BP p.l.c. "Connections to California" Do Not Establish That BP p.l.c. Purposefully Availed Itself of the Privilege of Conducting Business in California or Purposefully Directed Tortious Activity Toward California ..... 19

3. Exercising Jurisdiction over BP p.l.c. Would Be Unreasonable ..... 22

Conclusion ..... 23

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*,
551 F.2d 784 (9th Cir. 1977) .......... 10

*Axiom Foods, Inc. v. Acerchem Int'l, Inc.*,
874 F.3d 1064 (9th Cir. 2017) .......... 10, 13, 20

*BNSF Ry. Co. v. Tyrrell*,
137 S. Ct. 1549 (2017) .......... 11, 12

*Brackett v. Hilton Hotels Corp.*,
619 F. Supp. 2d 810 (N.D. Cal. 2008) .......... 13

*Brayton Purcell LLP v. Recordon & Recordon*,
606 F.3d 1124 (9th Cir. 2010) .......... 10

*Bristol-Myers Squibb Co. v. Superior Court*,
137 S. Ct. 1773 (2017) .......... *passim*

*Burger King Corp. v. Rudzewicz*,
471 U.S. 462 (1985) .......... 22

*CollegeSource, Inc. v. AcademyOne, Inc.*,
653 F.3d 1066 (9th Cir. 2011) .......... 10, 11

*Corcoran v. CVS Health Corp.*,
169 F. Supp. 3d 970 (N.D. Cal. 2016) .......... 10

*Daimler AG v. Bauman*,
134 S. Ct. 746 (2014) .......... *passim*

*Doe v. Am. Nat'l Red Cross*,
112 F.3d 1048 (9th Cir. 1997) .......... 13, 15, 16

*Doe v. Unocal Corp.*,
248 F.3d 915 (9th Cir. 2001) .......... 13, 14

*Dole Food Co. v. Watts*,
303 F.3d 1104 (9th Cir. 2002) .......... 13

*Goodyear Dunlop Tires Operations, S.A. v. Brown*,
564 U.S. 915 (2011) .......... 10, 12

*Martinez v. Aero Caribbean*,
764 F.3d 1062 (9th Cir. 2014) .......... 12

*Mavrix Photo, Inc. v. Brand Techs., Inc.*,
647 F.3d 1218 (9th Cir. 2011) ........ 10

*Morrill v. Scott Fin. Corp.*,
873 F.3d 1136 (9th Cir. 2017) ........ 13

*Mulato v. Wells Fargo Bank, N.A.*,
76 F. Supp. 3d 929 (N.D. Cal. 2014) ........ 10

*Panavision Int'l, L.P. v. Toeppen*,
141 F.3d 1316 (9th Cir. 1998) ........ 22, 23

*Perkins v. Benguet Consol. Mining Co.*,
342 U.S. 437 (1952) ........ 11

*Ranza v. Nike, Inc.*,
793 F.3d 1059 (9th Cir. 2015) ........ 9, 10, 11

*Rashidi v. Veritiss, LLC*,
No. 2:16-cv-04761-CAS, 2016 WL 5219448 (C.D. Cal. Sept. 19, 2016) ........ 13

*Schwarzenegger v. Fred Martin Motor Co.*,
374 F.3d 797 (9th Cir. 2004) ........ 10, 13, 20

*Sullivan v. Ford Motor Co.*,
No. 16-cv-03505-JST, 2016 WL 6520174 (N.D. Cal. Nov. 3, 2016) ........ 14, 16, 17

*Swartz v. KPMG LLP*,
476 F.3d 756 (9th Cir. 2007) ........ 10

*Terracom v. Valley Nat'l Bank*,
49 F.3d 555 (9th Cir. 1995) ........ 14, 15, 16

*Walden v. Fiore*,
134 S. Ct. 1115 (2014) ........ 20

*World-Wide Volkswagen Corp. v. Woodson*,
444 U.S. 286 (1980) ........ 9, 22

**Statutes**

Outer Continental Shelf Lands Act ........ 17

**Other Authorities**

Federal Rule of Civil Procedure 12(b)(2) ........ 1, 2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

## NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendant BP p.l.c. hereby moves the Court pursuant to Federal Rule of Civil Procedure 12(b)(2) to dismiss the complaints filed by the City of Oakland and the City of San Francisco ("the Cities") insofar as they relate to BP p.l.c. for lack of personal jurisdiction. The hearing on this Motion will be set by the Court, pursuant to the Court's March 1, 2018 Order Setting Deadline for Motions to Dismiss and Inviting United States to File Amicus Brief.[1] (ECF No. 118.)

By this Motion, BP p.l.c. seeks dismissal of all claims against it.

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, declarations, and exhibits, the pleadings on record in this action, and any other written or oral evidence or argument that may be presented at or before the time this Motion is decided.

---

[1] By Order dated February 27, 2018 [ECF No. 117], the Court invited counsel to conduct a tutorial concerning the history of scientific study concerning climate change and the present-day best climate change science. Intending to fully preserve BP p.l.c.'s personal jurisdiction defense, and to obtain a ruling on this motion at the earliest opportunity, counsel for BP p.l.c. will attend the tutorial and understands that counsel for Chevron Corporation will accept the Court's invitation and plans to fully participate in the tutorial. To avoid any contention or suggestion that BP p.l.c. has waived, abandoned, or acted inconsistently with its personal jurisdiction defense as set forth in this motion, however, BP p.l.c. respectfully declines the Court's invitation to conduct the tutorial.

## MEMORANDUM OF POINTS AND AUTHORITIES

BP p.l.c. respectfully submits this memorandum in support of its motion to dismiss the complaint for lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2).

### Introduction

BP p.l.c. moves to dismiss for lack of personal jurisdiction. BP p.l.c. is a United Kingdom parent company that is not "at home" in California 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 Cities' claim does not "arise out of or relate to" BP p.l.c.'s claim-related California contacts—even imputing all California contacts of its indirect subsidiaries to BP p.l.c.[2]—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 claim.

Examining the expansive contours of the Cities' claim reveals why the Cities cannot show, as they must, that their claim would not exist but for BP p.l.c.'s imputed California activities. First, as the Court noted, the claim "attack[s] behavior worldwide." (Order Denying Mots. To Remand at 7:10-11, ECF No. 134; *id.* at 6 n.2 (the claims "are not localized . . . and instead concern fossil fuel consumption worldwide").) Indeed, the extraction, transportation, and/or burning of fossil fuels has taken place at every spot on the surface of the earth and most spots under or on the oceans. Second, the actors involved in the behaviors that are allegedly producing climate change and related sea-level rise are equally 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 Cities have sued; transportation companies that move the raw product to treatment and refining centers; and various end users (manufacturers; power plants; airlines; federal,

---

[2] The Cities have 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. They have 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 in or for California 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 fossil fuel production in or for California by any indirect subsidiary may be imputed to BP p.l.c.

state, and local governments; and ordinary folks who drive cars and heat homes) who burn the fossil fuels. Third, and most critically, the fossil fuel production that the Cities would impute to BP p.l.c. and that occurred in or was directed at California could have made, even under the Cities' purported method of quantifying each defendant's individual responsibility, at most only a de minimis contribution to global greenhouse gas emissions, and consequently, to the alleged public nuisance.

More specifically, as will be shown below, if the Cities seek to apply an "attribution science" methodology[3] to all oil and gas produced by any indirect subsidiary of BP p.l.c. in or for California since 1975—the earliest date the Cities allege defendants knew that burning fossil fuels would cause climate change and sea-level rise—that methodology would estimate that this production contributed less than eight one-hundredths of one percent (more exactly, 0.079%) of the greenhouse gases emitted globally from all fossil fuel and cement production, and less than four one-hundredths of one percent (0.037%) of the greenhouse gases emitted globally by these sources or contributed by other human-controlled sources of greenhouse gas levels in the atmosphere (namely, deforestation, agriculture, livestock production, and other land-use changes). The percentages this method generates are even tinier when the method is used to estimate the contribution BP p.l.c.'s imputed California production made to global surface temperatures and sea-level rise (*i.e.*, the conditions said to be causing the nuisance).

Given this extraordinarily tenuous nexus, the Cities cannot show that their claimed property harms would have looked any different today in the absence of the California activities of BP p.l.c.'s indirect subsidiaries. It is unsurprising, therefore, that the complaint does not allege the essential jurisdictional fact that BP p.l.c.'s California activities are a but-for cause of the alleged public nuisances in San Francisco and Oakland. The Court should accordingly dismiss the complaint as against BP p.l.c. for lack of personal jurisdiction.

[3] 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 in detail below (*infra* pp. 6-9) are flawed for a host of reasons. Nonetheless, because the Cities have the burden to demonstrate that their claim would not have arisen but for BP p.l.c.'s California activities, BP p.l.c. discusses the theory and evidence that it anticipates the Cities may use to estimate BP p.l.c.'s individual contribution to the alleged nuisance, and shows why, even if the flawed method is applied to BP p.l.c.'s California production, the Cities still cannot meet their burden.

## Background

### A. The Cities' Claim

The Cities allege that global warming-induced sea-level rise is threatening public and private property in San Francisco and Oakland. (Compl. ¶ 1.)[4] They call each defendant a "multinational, integrated oil and gas company" (*id.* ¶¶ 15, 18, 21, 24, 27) that is among the ten "largest cumulative producers of fossil fuels worldwide from the mid Nineteenth Century to present" (*id.* ¶ 10). BP p.l.c., they claim, is the fourth largest such producer. (*Id.*) The Cities have not named as a defendant any other fossil fuel producer (including any of the other "largest cumulative producers"), nor other refiners, transporters, or sellers. Nor have they sued anyone for *using* (combusting) fossil fuels, which of course is what releases greenhouse gases into the atmosphere. (*Id.* ¶¶ 38, 53.)

Defendants allegedly have known "since at least the late 1970s and early 1980s" that fossil fuels would contribute to "dangerous global warming and associated accelerated sea level rise." (*Id.* ¶¶ 2, 5.) Fossil fuels do so, the Cities allege, by releasing "greenhouse gases, including carbon dioxide and methane, which trap atmospheric heat and increase global temperatures." (*Id.* ¶ 38.) Greenhouse gases emitted when a defendant's fossil fuels are combusted "combine[] with the greenhouse gas emissions from fossil fuels produced by the other Defendants, among others," in the atmosphere, where they can remain for hundreds of years or longer. (*Id.* ¶¶ 53, 96.) Defendants, despite allegedly knowing these facts, 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 Cities' claim "is the production and promotion of fossil fuels." (Pl.'s Reply Supp. Mot. Remand at 18, ECF No. 91.) The Cities are not suing defendants for their "direct emissions of greenhouse gases." (Compl. ¶ 11.)

### B. BP p.l.c.'s Lack Of Forum Contacts

BP p.l.c. is a public limited company that is registered in England and Wales and headquartered in London, England. (Compl. ¶ 15.) It is the ultimate parent company for a group of

[4] The allegations contained in the Cities' complaints are materially identical, and therefore, for ease of reference, all citations to the complaint in this Motion are to the complaint filed by the City of San Francisco in Case No. 3:17-cv-06012-WHA.

separately organized companies that together comprise a global energy business. (Decl. of Donna Sanker ("Sanker Decl.") ¶ 3, filed concurrently.) Among other activities, the direct and indirect subsidiaries (for convenience, the BP p.l.c. group) find and produce oil and gas on land and offshore around the globe; refine oil into products such as gasoline, diesel fuel, and jet fuel; and market and sell oil, fuel, other refined petroleum products, and natural gas around the globe. (*Id.*.)

BP p.l.c. does not employ personnel assigned to California; maintain any offices or facilities in California; or conduct regular business activities in California of its own accord. (*Id.* ¶ 4.) It is not qualified or registered to do business in California. (*Id.*) And BP p.l.c. has never extracted oil or natural gas in California; operated an oil refinery or terminal in California; or marketed or sold oil, fuel, other refined petroleum products, or natural gas in California. (*Id.* ¶ 5.)

No indirect subsidiary of BP p.l.c. has owned any oil- or natural gas-producing assets in California since 2000. (*Id.* ¶ 6.) Some indirect subsidiaries of BP p.l.c. extracted fossil fuels in California between 1975 and 1999—*before* they joined the BP p.l.c. group of companies; and some extracted fossil fuels outside California for shipment into the state between 1975 and 2010, as follows:

- Atlantic Richfield Company ("Atlantic Richfield") joined the BP p.l.c. group in 2000, becoming an indirect subsidiary of BP Amoco p.l.c. (as BP p.l.c. was then named). Between 1975 and 1999 (*i.e.*, *before* it joined the group), Atlantic Richfield's business included extracting oil and natural gas in California; operating an oil refinery in Carson, California; and transporting, marketing, and selling fuel and other refined products in California, including to and through ARCO-branded gasoline stations. Atlantic Richfield had already divested its interests in California extraction facilities by the time it joined the BP p.l.c. group in 2000 (*id.* ¶ 6.a);

- In the late 1960s, Standard Oil Company of Ohio ("Sohio") had service stations and refining capacity in the United States but not adequate access to crude oil. BP p.l.c. (then The British Petroleum Company) had found oil in Alaska but had no infrastructure in the United States to sell it through. The two companies accordingly agreed in 1968 that the BP p.l.c. group would initially take a 25% stake in Sohio in exchange for the Alaskan crude, with the understanding that its shareholding in Sohio would rise with the production from Alaska. In 1978, one year after the first oil flowed through the Trans-Alaskan Pipeline, the BP p.l.c. group became the majority Sohio shareholder. In 1987, the group acquired Sohio outright, making Sohio an indirect subsidiary of BP p.l.c. Between 1975 and 1986 (*i.e.*, *before* BP p.l.c. acquired Sohio outright), Sohio's business included extracting oil in Alaska for shipment, in part, to California (*id.* ¶ 6.b);

- BP Exploration (Alaska) Inc. ("BPXA")'s business includes extracting oil in Alaska for shipment to destinations that include California. It is an indirect subsidiary of BP p.l.c. resulting from a series of mergers between preexisting subsidiaries of BP p.l.c. and Sohio from the late 1960s to 1989 (*id.* ¶ 6.c).

None of these indirect subsidiaries is "at home" in California. (*Id.* ¶ 6.a-c.) The Cities also

allege, however, that "through its subsidiaries," BP p.l.c. has "connections to California" that include owning or operating port facilities to receive crude oil, shipping Alaskan crude oil to California, licensing the ARCO trademark and brand to gasoline stations, and promoting gasoline sales over a company Web site that offers credit cards and gasoline discounts. (Compl. ¶ 33.)

The complaint does not allege, either factually or conclusorily, that these purported activities in or directed at California gave rise to the alleged public nuisance. Nor does it allege that global levels of greenhouse gases in the atmosphere (which are what the Cities assert cause climate change) would have decreased *at all* in the absence of BP p.l.c.'s alleged contacts with California. Based on the complaint's citation to the 2015 article discussed in the next section, the Cities may seek to rely on an "attribution science" theory to prove BP p.l.c.'s individual contribution to climate change. However, that theory cannot fill this jurisdictional void because it does not show that greenhouse gas levels would have been any lower but for the fossil fuels extracted from one state, which, at least in the case of California, made at most a de minimis contribution if that attribution science theory is believed.

**C. <u>How The Cities May Estimate BP p.l.c.'s Purported Contribution To The Nuisance</u>**

The Cities assert that defendants "are substantial contributors to the public nuisance of global warming that is causing injury to the People." (*Id.* ¶ 10.) Indeed, the Cities may claim they can quantify, and have quantified, defendants' individual and collective contributions to global greenhouse gas emissions and associated global warming and sea-level rise. BP p.l.c. disagrees. But as purported support for the Cities' position, the complaint numerically ranks each defendant on a supposed list of the "largest cumulative producers of fossil fuels" (*id.* ¶ 10) that plaintiffs copied from a 2014 study by Richard Heede in the purported field of climate "attribution science," and also cites a 2015 "peer-reviewed scientific" study (*id.* ¶ 56 & n.34) entitled "The Climate Responsibilities of Industrial Carbon Producers," which, building on Heede's earlier work, claims to quantify "the responsibility of industrial carbon producers" for "anthropogenic climate change." (Decl. of John Lombardo ("Lombardo Decl.") ¶ 2 n.1 & Ex. 19 at 161-62 & Fig. 2.) The Cities' lead 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 Cities' 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.)

As noted, BP p.l.c. disagrees with these studies, which it views as flawed in numerous respects. (*Supra* note 3.) But if their estimates are accepted *arguendo* solely for purposes of this motion, the studies would attribute to BP p.l.c. 2.47% of global "industrial" greenhouse gas emissions between 1854 and 2010. (Lombardo Decl. Ex. 1 at 237 Table 3 (Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854-2010*, 122 Climatic Change 229 (2014).) To derive this percentage, Heede sought to collect information about worldwide fossil fuel and cement production by each of what he called the ninety "Carbon Majors," including oil, gas, and coal production by worldwide affiliates of BP p.l.c. (or predecessor entities) going back to 1913. (*Id.* at 231-32; *id.* ¶ 3, Ex. 2 at 9-15 & Ex. 3.) After applying numerous interpolations, assumptions, and other 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 that he obtained through the foregoing steps by 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.* Ex. 1 at 232.) Finally, Heede then 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.) In their most recent study (2017), which introduces new flaws on top of the ones in the original analysis, Heede and his collaborating authors extended this initial analysis to

attempt to quantify not merely individual contributions to *emissions*, but also to changes in global mean surface *temperatures* and global *sea levels*. (*Id.* Ex. 4.) This study attributes approximately 1.5% and 0.5% of historical global sea-level rise to emissions from BP p.l.c.'s worldwide fossil fuels production over the periods 1880-2010 and 1980-2010, respectively. (*Id.* at 585 Fig. 2.)

These analyses are illustrative of how the Cities might say they assess BP p.l.c.'s supposed individual contribution to the alleged public nuisance for purposes of this motion, with at least two important adjustments:

*Time period adjustment.* The Cities claim defendants have tortiously produced and promoted fossil fuel products since the late 1970s and early 1980s, when they allege defendants knew of the dangers of global warming. (Compl. ¶ 2.) Adjusting these centuries-long studies to count only BP p.l.c.'s imputed production during the years 1975 to 2010 reduces BP p.l.c.'s attributed share of global emissions to 1.5%. (Lombardo Decl. ¶¶ 19 & 21.)

*Forum-related adjustment.* Further adjusting the studies' *worldwide* production data to count only fossil fuels that BP p.l.c. subsidiaries[5] produced in or for shipment to California further reduces BP p.l.c.'s attributed share of global emissions to 0.079% (or 1/1,265ths). (*Id.* ¶¶ 20-21.)

While these figures are the unreliable outputs of a flawed methodology, these adjustments replicate the studies' methods after tailoring BP p.l.c.'s imputed production to cover only the time period and forum that could possibly be relevant to this motion. It is worth noting two important respects in which these figures greatly *over*state BP p.l.c.'s alleged contribution to the alleged nuisance, however: First, these percentages reflect the studies' estimate of BP p.l.c.'s *emissions* contributions, not BP p.l.c.'s imputed contribution to *sea-level rise*; and the latter contribution is, even according to the 2017 study, a small fraction of the former. (*Compare id.* ¶ 5 *with id.* ¶¶ 18-21.)

Second, the studies' methodology vastly overstates BP p.l.c.'s (and each other defendant's) individual contribution to anthropogenic greenhouse gas emissions because, in one of many critical

[5] These studies even impute California production to BP p.l.c. by business entities that BP p.l.c. did not own when the production occurred. For example, Atlantic Richfield did not join BP p.l.c until 2000, yet the studies count that company's pre-2000 production in BP p.l.c.'s total. (Lombardo Decl. Ex. 3; *see also* Lombardo Decl. at 13 n. 5.) As noted, BP p.l.c. does not contest that imputation solely for purposes of this motion. (*Supra* note 2.)

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

shortcomings, it only counts emissions from fossil fuel and cement production. Doing so ignores other, *larger* sources of recognized human contribution to greenhouse gas levels in the atmosphere, the largest of which are deforestation, land-use changes, agriculture, and livestock production. (*Id.* ¶¶ 6-17.) Collectively, these sources more than *double* the total greenhouse gas levels in the environment above the limited "industrial" emissions the studies consider. (*Id.*) Against this more robust pool of anthropogenic greenhouse gases sources, BP p.l.c.'s imputed contribution from subsidiaries' production in or for California from 1975 to 2010 would be a paltry 0.037% (or 1/2,703rds), if one extrapolates from the studies' flawed methodology.[6] (*Id.* ¶ 21.)

**Argument**

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

Due process 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. 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.*

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

[6] Of course, all of these contribution percentages would have to be further slashed if they were to represent BP p.l.c.'s purportedly *tortious* contribution to the Cities' claimed injuries. The Cities do not allege that *all* fossil fuel production would have ceased in the late 1970s or early 1980s but for defendants' supposed efforts to cast doubt on climate science. In view of built-in structural demand for fossil fuels (*e.g.*, internal combustion engines and industrial machinery) and the lack of ready alternatives, any drop in BP p.l.c.'s production would surely have been replaced by another producer. Even if the Cities deny this, however, they still must concede that a very substantial share of the demand for fossil fuel production would have persisted even in the absence of any claimed tortious activity. Thus, only a mere fraction of BP p.l.c.'s 0.037% imputed California contribution to global anthropogenic greenhouse gas emissions can even theoretically be regarded as a potentially *tortious* contribution.

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); *Mulato v. Wells Fargo Bank, N.A.*, 76 F. Supp. 3d 929, 943 (N.D. Cal. 2014). Nor may the court "assume the truth of allegations in a pleading which are contradicted by affidavit." *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011). In those instances, the plaintiff "cannot 'simply rest on the bare allegations of its complaint'" to meet its burden to establish the essential jurisdictional facts. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (quoting *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977)); *see Corcoran v. CVS Health Corp.*, 169 F. Supp. 3d 970, 979 (N.D. Cal. 2016) (the plaintiff's prima facie showing requires "producing admissible evidence which, if believed, would be sufficient to establish the existence of personal jurisdiction").

Here, the Cities have not pleaded and cannot prove the facts needed to establish either general or specific 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 California." (Compl. ¶¶ 31-33.) The complaint's theory of jurisdiction is accordingly that California's long-arm statute, which permits jurisdiction as broadly as due process allows, applies. *See Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1067 (9th Cir. 2017) ("the jurisdictional analyses under [California] state law and federal due process are the same" (quoting *Mavrix Photo, Inc.*, 647 F.3d at 1223)).

**A. <u>BP p.l.c. Is Not "At Home" (And Thus Subject To General Jurisdiction) In California</u>**

A foreign corporation is not subject to general jurisdiction in a state unless its "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)). Except in "an exceptional case," a corporation is only "at home" in a forum where it is incorporated or has its principal place of business. *Id.* at 760-62 & n.19; *Ranza*, 793 F.3d at 1069. 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 California. As the Cities admit, BP p.l.c. is a "multinational, integrated oil and gas company" that is "registered in England and Wales with its headquarters in London, England." (Compl. ¶ 15.) Nothing in the complaint would justify treating this as an "exceptional case," moreover. The Cities do not allege, for example, that California has become BP p.l.c.'s global nerve center.[7] Nor could they in good faith so allege, because BP p.l.c. does not have an office or other facility; does not have any employees; is not registered to do business; and does not carry on regular business activities, in California. (Sanker Decl. ¶ 4.) More specifically, BP p.l.c. does not extract, refine, market, promote, or sell fossil fuel products in California. (*Id.* ¶ 5.)

Far from alleging facts that could establish that BP p.l.c. is at home in California, the complaint merely alleges that subsidiaries of BP p.l.c. have done or are doing business in the state, precisely as the plaintiff in *Daimler AG* alleged. For example, the Cities allege that subsidiaries of BP p.l.c. produce and sell fossil fuel products to California residents; operate California port facilities where they receive crude oil; transport Alaskan crude oil to California; promote gasoline sales by offering credit cards and discounts; and license the ARCO trademark and brand to California gasoline stations.

[7] 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.

(Compl. ¶¶ 32-33.) Even imputing these subsidiaries' California business activities to BP p.l.c. (as the Court assumed *arguendo* in *Daimler AG*), they would *at most* show that BP p.l.c. does substantial, continuous business in California, just as Daimler did as the state's "largest supplier of luxury vehicles" and through its multiple California-based facilities, *see* 134 S. Ct. at 752, and just as BNSF Railway Company did in Montana, where it had 2,000 workers and 2,000 miles of railroad track that did not render it "at home," *see BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017); *see also Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014) ("This is not such an exceptional case," where foreign 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, however.

The Cities have not met, and cannot meet, their "exacting" burden to show that BP p.l.c. is at home in California.

**B. Nor Is BP p.l.c. Subject To Specific Jurisdiction In California 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":

> (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 of the test. *Schwarzenegger*, 374 F.3d at 802.

None of the requirements for exercising specific jurisdiction is met here.

### 1. The Claim Does Not Arise out of or Relate to BP p.l.c.'s California 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 California"); *Brackett v. Hilton Hotels Corp.*, 619 F. Supp. 2d 810, 818 (N.D. Cal. 2008) ("arises out of or relates to" prong "requires a showing of 'but for' causation—plaintiff must demonstrate that she would not have been injured but for defendants' conduct directed toward her in the forum"). Under this "but for" test, the plaintiff must present evidence showing 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). Where the plaintiff presents "no evidence" that the defendant's California 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 (where the defendant's California activities were not the cause of the plaintiffs' alleged injuries, 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 "present[ed] no evidence . . . suggesting 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 larger scale, the plaintiff must show that the defendant's *California* activities, in particular, were a but-for cause of its injuries. In *Sullivan v. Ford Motor Co.*, No. 16-cv-03505-JST, 2016 WL 6520174 (N.D. Cal. Nov. 3, 2016), for example, the court held that Ford was not subject to specific jurisdiction in California for a claim alleging injury from a defectively designed truck, despite Ford's "nationwide marketing, promotion, and distribution of cars and trucks," its active marketing of vehicles in California, and its sale of over 200,000 Ford vehicles in the state in one year, because the specific truck that injured the plaintiff was not designed, manufactured, or sold to a Ford dealership in California. *Id.* at *2-3. Given these facts, the court concluded, "there [was] every reason to think that [the plaintiff]'s injury would have occurred regardless of Ford's contacts with California. In other words, [the plaintiff] cannot satisfy the Ninth Circuit's 'but for' test." *Id.* at *3. *Sullivan* 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 them were not developed, made, labelled, packaged, or sold to them in California. *Id.* at 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.

California activities also fail the but-for test when actors besides the defendant contribute to the plaintiff's injury and the plaintiff accordingly cannot show that its injury would have been avoided but for the forum-related conduct of the defendant. 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 ("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 BP p.l.c.'s California activities are a but-for cause of the Cities' claimed injury**

Here, the Cities have not alleged, either factually or even in conclusory terms, that BP p.l.c.'s California activities are a but-for cause of the "global warming-induced sea level rise" that they say is damaging their coastal properties. Indeed, not only is the concept of but-for causation entirely missing from the complaint, but the Cities' allegations leave no doubt that their theory is that the alleged public nuisance resulted from *all* worldwide production of fossil fuels, including, but certainly not limited to, BP p.l.c.'s production outside California and the worldwide productions of each of the other defendants. (Compl. ¶¶ 15-17 (alleging BP p.l.c. is "a multinational, integrated oil and gas company" that "controls" and "is responsible for" all "past and current production and promotion of fossil fuel products" by all of "its subsidiaries"); *id.* ¶ 10 (each defendant is a "substantial contributor[] to the public nuisance of global warming" based on its global "cumulative production of fossil fuels").) As the Court has observed, "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. (Order Denying Mots. To Remand at 7:11-13, ECF No. 134.) But alleging that *all worldwide* fossil fuel production "substantially contributed" to the purported

1 nuisance is a far stretch from alleging that *BP p.l.c.'s California* production is a but-for cause of the
2 nuisance. In particular, the complaint does not allege, and the Cities cannot show, that if BP p.l.c. had
3 reduced or even halted its indirect subsidiaries' extraction activities in California, worldwide
4 greenhouse gas emissions would have decreased, curtailing global warming and sea-level rise.
5 Nothing in the complaint negates the far more plausible inference that other suppliers simply would
6 have replaced BP p.l.c.'s limited California production to satisfy the durable demand for fossil fuels,
7 which users would have combusted at the same rate. The Cities' causal theory is thus jurisdictionally
8 deficient under *Bristol-Myers Squibb Co.* and *Sullivan*, which teach that nationwide activities by a
9 large corporation—even nationwide activities of the sort the plaintiff complains of—do not establish
10 the requisite but-for causal link between the defendant's in-forum activities and the plaintiff's injury.

11 Also negating the essential but-for causation is the complaint's allegation that innumerable
12 other fossil fuel producers besides BP p.l.c. have contributed to the alleged nuisance. The Cities admit
13 they have only sued a handful of the world's "largest cumulative producers of fossil fuels worldwide."
14 (Compl. ¶¶ 10, 53.) And they allege that global warming results not from any single producer's
15 attributed emissions, but rather because greenhouse gases from fossil fuels produced by *all*
16 producers—defendant and non-defendant—combine in the global atmosphere where they cannot be
17 physically traced to an individual producer. (*Id.* ¶ 96 ("emissions of greenhouse gases from the fossil
18 fuels [each defendant] produces combines [sic] with the greenhouse gas emissions from fossil fuels
19 produced by the other Defendants, *among others*, to result in dangerous levels of global warming")
20 (emphasis added).) These allegations, too, are deficient to meet the Cities' burden to plead that BP
21 p.l.c.'s California activities are a but-for cause of their claimed sea-level rise harm, because, as in
22 *Terracom* and *Doe v. American National Red Cross*, it cannot be said that the contributions of other
23 actors (besides BP p.l.c.) would not have been sufficient to cause that harm but for BP p.l.c.'s
24 California activities.

25 In sum, the complaint alleges BP p.l.c., the other defendants, and countless others have
26 produced massive amounts of fossil fuels worldwide, yet nowhere alleges that the Cities "would not
27 have sustained [their] injury" but for BP p.l.c.'s California activities. *See Am. Nat'l Red Cross*, 112
28 F.3d at 1051-52. From all that appears in the complaint, therefore, "there is every reason to think that

[the Cities'] injury would have occurred regardless of [BP p.l.c.]'s contacts with California." *See Sullivan*, 2016 WL 6520174, at *3. The complaint accordingly fails to plead that the Cities' claim arises out of or relates to BP p.l.c.'s California activities.

**b. If the Cities rely on "attribution science," that methodology likewise suggests that BP p.l.c.'s California contacts are not a but-for cause of the claimed injury**

The Cities cannot meet their 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 Cities' claimed injuries. If the Cities try to overcome their pleadings' deficiencies by turning to attribution science, that theory will not help the Cities either. Even imputing all fossil fuel production by BP p.l.c.'s indirect subsidiaries in or for California since 1975 to BP p.l.c., the greenhouse gas emissions attributable to that production made too insubstantial a contribution to the "global warming-induced sea level rise" that is allegedly harming the Cities, to be deemed a but-for cause of that harm, according to that methodology. As explained above, using those studies' emissions factors, greenhouse gas emissions attributable to BP p.l.c.'s imputed California production since 1975 contributed only 0.037% of global $CO_2$-equivalent emissions from industrial fossil fuel and cement production and other recognized human emissions sources (deforestation, agriculture, livestock), since the Industrial Revolution. (*Supra* p. 9.) Even if the global emissions denominator is artificially restricted to the two sources considered in the studies (fossil fuels and cement production), this contribution grows only to 0.079%. Either way, the Cities do not and could not allege, and cannot show, that they would not have sustained their claimed harm from sea-level rise but for this de minimis contribution. To the contrary, there is every reason to think the Cities' injury would be no different regardless of BP p.l.c.'s insubstantial California contribution.

Indeed, the Cities themselves have said as much. They argued that far more massive amounts of fossil fuel production are not a but-for cause of their injury, in opposing subject matter jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"). In particular, the Cities argued offshore production on the OCS, which has constituted up to one-third of *all* domestic oil and gas production, "is not a but-for cause of the People's injuries." (Pl.'s Reply Supp. Mot. Remand at 20-21, ECF No. 91.) The Cities called OCS production, which dwarfs BP p.l.c.'s imputed California contribution,

"only a small subset" of the activities on which their nuisance claim is based. (*Id.* at 20.) And they flatly asserted that "the People *would* have a claim even absent any OCS conduct." (*Id.* at 21.) *A fortiori*, the Cities would have a claim even absent BP p.l.c.'s de minimis California conduct.

**c. Permitting specific jurisdiction on the basis of these tenuous 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) and multiple facilities and vehicle sales in California, which accounted 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 California's jurisdiction over BP p.l.c. in this action would directly disregard the teachings of these controlling decisions, because it would effectively authorize specific jurisdiction everywhere. This is true even if some quantum or character of in-state conduct less than a but-for cause could ever satisfy the "arises out of or relates to" requirement, which, at least under controlling Ninth Circuit case law, it cannot do. Subsidiaries of integrated global energy businesses such as these defendants operate around the nation and world. If a contribution of just 0.037% to global greenhouse gas emissions from BP p.l.c.'s imputed California activities sufficed to require BP p.l.c. to defend this claim in this Court, the same "global reach" would presumably be available everywhere BP p.l.c.'s

subsidiaries have operations, 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 other alleged California connections add nothing to this analysis**

The Cities attempt to dress up the fossil fuel production that is the gravamen of their claim with a hodgepodge of other supposed BP p.l.c. "connections to California." (Compl. ¶¶ 32-33.) As the next section shows, the specific connections they allege for BP p.l.c. are largely factually incorrect. (*Infra* pp. 20-22.) But even if the Cities could obtain evidence to prove these connections, it would remain true that the Cities have not alleged, and cannot show, that BP p.l.c.'s imputed California activities are a but-for cause of their claimed harm. This is so because embroidery about California logistics and marketing efforts—activities such as importing Alaskan crude oil to California,[8] and maintaining a company Web site that promotes gasoline sales—does not bring the Cities any closer to showing that the claimed nuisance would have been avoided but for BP p.l.c.'s California activity. It could not do so, because that embroidery does not alter in any way the Cities' own estimation of the contribution BP p.l.c.'s California activities made to climate change-induced sea-level rise, which rests entirely on BP p.l.c.'s extraction of oil and natural gas. In other words, even if it were true that BP p.l.c. owns or operates California port facilities to receive crude oil and advertises gasoline on its Web site accessible in California, the total contribution that *all* of BP p.l.c.'s imputed California activities made to worldwide greenhouse gas emissions from human causes (0.037%) or to worldwide industrial greenhouse gas emissions (0.079%) remains the same under the Cities' attribution analysis. Operating a Web site or a terminal facility does not increase that miniscule contribution, which is inadequate to constitute a but-for cause for all the reasons discussed above.

**2. Allegations About Other BP p.l.c. "Connections to California" Do Not Establish That BP p.l.c. Purposefully Availed Itself of the Privilege of Conducting Business in California or Purposefully Directed Tortious Activity Toward California**

The preceding section showed that the Cities cannot meet their burden to demonstrate that BP p.l.c.'s California fossil fuel production is a but-for cause of the Cities' injury, even imputing all in-

[8] BP p.l.c. has *included* the Alaskan crude oil that an indirect subsidiary produced for shipment to California in calculating its total production "in or for California." (Lombardo Decl. ¶ 20.e; Decl. of William Jeffries, filed concurrently.) Thus, BP p.l.c.'s purported California contribution of 0.037% to global greenhouse gas emissions from human causes already accounts for this production activity.

state subsidiaries' conduct to BP p.l.c. Here, BP p.l.c. shows that the complaint's allegations about other BP p.l.c. "connections to California" are untrue and irrelevant. Consequently, these other alleged connections do not aid the Cities in meeting their burden to show that BP p.l.c. purposefully availed itself of the privilege of conducting business in California or purposefully directed tortious activity toward California.

Purposeful availment "must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." *Axiom Food, Inc.*, 874 F.3d at 1068 (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014)). The defendant's "suit-related conduct must create a substantial connection with the forum State." *Id.* (quoting *Walden*, 134 S. Ct. at 1121). Tortious acts performed outside the forum state can constitute purposeful direction only if the defendant expressly aimed intentional acts at the state, making the state the "focal point" of the harm suffered. *Id.* at 1069-71. However, conduct that is geographically *un*targeted and "merely happen[s] to cause harm" to a forum resident does not suffice.[9] *Schwarzenegger*, 374 F.3d at 806-07.

Beyond the generic allegation that BP p.l.c., through its subsidiaries, extracts and markets fossil fuels in California, the complaint alleges a handful of specific "connections to California" that are each untrue, irrelevant, or both. Taking each purported "connection" in turn:

*Web site promotion.* The Cities allege that BP p.l.c. maintains an interactive Web site on which it (i) "offers credit cards to consumers . . . to promote sales of gasoline and other products at its branded gasoline stations"; (ii) lists hundreds of California "BP Amoco Stations Near Me" in "virtually every municipality in California"; and (iii) offers gasoline discounts as a "reward" for amounts charged to a BP Visa Credit Card for the first ninety days. (Compl. ¶ 33.) In reality, the Web site (mybpstation.com) does not advertise or promote gasoline sales in California, because the gasoline stations it promotes—stations branded with the Helios trademark ("BP-branded" stations)—are not found in California. (Sanker Decl. ¶ 8; *id.* Ex. 2.) (Nor is the Web site maintained by BP p.l.c., but rather by BP Products North America, Inc., an indirect subsidiary that markets and distributes gasoline to BP-branded stations.) (*Id.* ¶ 8.) What's more:

[9] For this reason, fossil fuel production and promotion by BP p.l.c. entities around the world, lacking any nexus to California, cannot constitute purposeful availment or purposeful direction here.

i. The credit cards offered on mybpstation.com are BP-branded cards that promote sales at BP-branded gasoline stations. These promotions could not possibly target California since there are no BP-branded gas stations in California. (*Id.*)

ii. The "Station Finder" on this Web site (https://www.mybpstation.com/station-finder) does not list any gas stations in California. That is because, once again, there are no BP-branded gas stations in California. (*Id.* ¶ 8, Ex. 2.) The unrelated Web page referenced in the complaint, "BP Amoco Stations Near Me," belongs to a third party; it is not operated by any BP p.l.c. entity. (*Id.* ¶ 8.)

iii. Credit card "reward" discounts are explicitly redeemable only at BP-branded gas stations. *See* https://www.mybpstation.com/faq?tab=bpcreditcardsfaqs (rewards can be redeemed at the pump, "excluding non-BP branded gas stations"). Since there are no BP-branded gas stations in California, reward discounts are not redeemable in California either. (Sanker Decl. ¶ 8.)

*Port facilities.* The Cities allege "BP, through its subsidiaries, owns and/or operates port facilities in California for receipt of crude oil." (Compl. ¶ 33.) Although BP West Coast Products LLC ("BPWCP") once owned California terminal facilities, it has since sold them. (Sanker Decl. ¶ 7.) (BP p.l.c. itself has never owned or operated a California terminal facility. (*Id.* ¶ 5.))

*Alaskan crude oil imports.* The Cities allege that "BP, through its subsidiaries, . . . produces oil in Alaska, and upon information and belief, BP, through its subsidiaries, transports some of this crude oil to California." (Compl. ¶ 33.) Again, BP Exploration (Alaska), an indirect subsidiary of BP p.l.c., has produced crude oil in Alaska, some of which was transported to California and counted in the attribution analysis discussed above. (Jeffries Decl.; Sanker Decl. ¶ 6.c; Lombardo Decl. ¶ 20.e.) (BP p.l.c. has not produced crude oil in Alaska for shipment to California. (Sanker Decl. ¶¶ 5-6.))

*Operation of gas stations.* The Cities allege that "BP operates 275 ARCO-licensed and -branded gasoline stations in California, including stations located in San Francisco." (Compl. ¶ 33.) The allegation is incorrect. BPWCP, an indirect subsidiary, licenses the ARCO brand for use at gas stations in Northern California, ninety-five percent (95%) of which are operated by independent dealers and franchisees. (Sanker Decl. ¶ 7.) The remaining 5% are operated by commissioned operators of BPWCP. (*Id.*) (BP p.l.c. has never operated a gasoline station in California. (*Id.* ¶ 5.))

In sum, the Cities' allegations about BP p.l.c.'s claimed "connections to California," beyond its imputed production of fossil fuels in or for the state, are false and irrelevant. The Cities accordingly have not met their burden to show purposeful availment by BP p.l.c. through these other activities.

**3. 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 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 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 California forum elevates the state's sovereignty beyond any appropriate bounds. The state admittedly has an interest in protecting its coastal property. But these claims purportedly reach all worldwide fossil fuel production by BP p.l.c. and the other defendants, and California has no greater interest in applying U.S. tort law to that production than any other state or nation would. Moreover, the sovereignty of the UK courts with respect to this controversy implies a limitation on the sovereignty of the California courts, *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780, particularly as UK courts resist "uninhibited approach[es] to personal jurisdiction" that draw their local corporations into existential litigation in multiple fora, *Daimler AG*, 134 S. Ct. at 763.

These concerns are real and practical, not simply 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 judgment 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. California does not have any unique interest in this claim involving conduct and alleged effects dispersed throughout the globe.

**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: March 20, 2018.

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ Jonathan W. Hughes
Jonathan W. Hughes
Matthew T. Heartney
John D. Lombardo
Philip H. Curtis
Nancy Milburn

Attorneys for Defendant BP p.l.c.