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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,

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, 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 Case: No. 3:17-cv-6012-WHA

DEFENDANTS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S ORDER

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

THE HONORABLE WILLIAM ALSUP

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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, 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, 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

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I. INTRODUCTION

This Court has ordered the parties to brief "the extent to which adjudication of plaintiffs' federal common law nuisance claims would require the undersigned judge to consider the utility of defendants' alleged conduct."[1] No. 17-cv-6011, ECF No. 259 at 2.[2] Under well-established nuisance law, Plaintiffs' claims would require the Court to weigh the utility of Defendants' fossil-fuel extraction against the alleged harms resulting from that activity in order to determine whether Defendants' conduct is unreasonable. Absent such a finding of unreasonableness, there can be no public nuisance.

Relying on a single comment to a provision in the Restatement addressing damages, Plaintiffs ask this Court to create a brand new public nuisance tort—ready-made for global warming litigation—that would allow them to recover billions of dollars in "abatement funds" without any showing of actual harm or consideration of the social utility of fossil-fuel extraction. But the Restatement itself refutes Plaintiffs' argument, and the judicial innovation Plaintiffs urge would flatly contradict the Supreme Court's admonition to proceed cautiously when fashioning new remedies or expanding private causes of action. Caution is particularly warranted here because Congress has already balanced the risk of global warming with the economic and national security benefits of fossil-fuel extraction and unequivocally encouraged the production of fossil fuels. Thus, to determine whether Defendants "unreasonably" interfered with any public rights, this Court would have to engage in the traditional balancing analysis—second-guessing Congress in the process—by weighing the alleged harms suffered by Plaintiffs against the enormous social utility of Defendants' lawful conduct.

II. ARGUMENT

A. The Law of Nuisance Has Always Required a Balancing of Harms and Benefits

Courts—both federal and state—as well as the Restatement and leading treatises on tort law all confirm that the law of nuisance requires a balancing of the alleged harms suffered by the plaintiff with the utility of the defendant's conduct for society at large.

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[1] Defendants ExxonMobil, ConocoPhillips, Royal Dutch Shell, and BP are filing the instant brief in response to the May 25, 2018 Order issued by this Court (Dkt. 259). Defendants do not waive their objections to personal jurisdiction by joining in this filing.

[2] All record citations are to No. 17-cv-6011 unless stated otherwise.

Start with the Restatement (Second) of Torts. The Restatement defines "a public nuisance" as "an ***unreasonable*** interference with a right common to the general public." Restatement (Second) of Torts § 821B (emphasis added).[3] By definition, an inquiry into reasonableness requires balancing the benefits of the activity against the costs: "Whether the interference is unreasonable turns on weighing 'the gravity of the harm against the utility of the conduct.'" *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 874 (N.D. Cal. 2009), *aff'd* 696 F.3d 849 (9th Cir. 2012) (quoting Restatement § 821B cmt. e); *see also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 88, at 626 (5th ed. 1984) ("[P]ractically all human activities interfere to some extent with others in the use and enjoyment of land. . . . Such conduct is unreasonable only if the gravity of the harm caused outweighs the utility of the conduct."); *San Diego Gas & Elec. Co. v. Sup. Ct.*, 13 Cal. 4th 893, 938 (1996) ("The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account.") (citing Restatement §§ 826–831); *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1105 (1997) ("The unreasonableness of a given interference represents a judgment reached by comparing the social utility of an activity against the gravity of the harm it inflicts, taking into account a handful of relevant factors."); *Florida E. Coast Props., Inc. v. Metro. Dade County*, 572 F.2d 1108, 1112 (5th Cir. 1978) (in "every case," the court "must make a comparative evaluation of the conflicting interests").

Comment e to Restatement § 821B provides several different categories of "unreasonable interference," but it explains that "[i]n each of these categories, some aspect of the concept of unreasonableness is to be found." The comment instructs that "[t]his analysis is set forth below in §§ 826–831," and those sections, in turn, confirm that the test for nuisance entails a cost-benefit analysis to determine unreasonableness. In fact, the titles of those sections alone make this framework clear: Section 826 is titled "Unreasonableness of Intentional Invasion"; Section 827, "Gravity of Harm—Factors Involved"; Section 828, "Utility of Conduct—Factors Involved." Sections 829 through 831 set forth the various ways of balancing "Gravity vs. Utility." Further, Section 828 directs courts to

[3] All citations to the Restatement are to the Restatement (Second) of Torts. Defendants do not concede that the Restatement's nuisance principles can be transposed into the global warming context, but merely assume the point arguendo.

1 consider the following factors when "determining the utility of conduct": "(a) the social value that the
2 law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character
3 of the locality; and (c) the impracticability of preventing or avoiding the invasion." "Fundamentally,
4 the unreasonableness [analysis] . . . is a problem of relative values to be determined by the trier of
5 fact in each case in the light of all the circumstances of that case." *San Diego Gas & Elec.*, 13 Cal.
6 4th at 938–39 (quoting Restatement § 826 cmt. b); *see also* Restatement § 822 cmt. g ("the law of
7 torts does not attempt to impose liability or shift the loss in every case in which one person's conduct
8 has some detrimental effect on another.").

9 The Supreme Court made this very point in *AEP*, holding that the nuisance claims at issue
10 there would require "complex balancing" of "competing interests": "Along with the environmental
11 benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption
12 must weigh in the balance." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011) ("*AEP*");
13 *see also Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 326–27 (2d Cir. 2009) (explaining that in
14 the resolving interstate public nuisance cases, the Supreme Court has "appraised the sophisticated sci-
15 entific and expert evidence offered, [and] weighed the equities"); *Kivalina*, 663 F. Supp. 2d at 874
16 ("factfinder [would] have to weigh, inter alia, the energy-producing alternatives that were available in
17 the past and consider their respective impact on far ranging issues such as their reliability as an en-
18 ergy source, safety considerations and the impact of the different alternatives on consumers and busi-
19 ness at every level"); *California v. Gen. Motors Corp.*, 2007 WL 2726871, at *8 (N.D. Cal. 2007)
20 ("the adjudication of Plaintiff's claim would require the Court to balance the competing interests of
21 reducing global warming emissions and the interests of advancing and preserving economic and in-
22 dustrial development").

23 This principle is fundamental, and courts nationwide have applied this balancing test in nui-
24 sance cases for centuries. Over 100 years ago, when asked to enjoin a socially valuable mining oper-
25 ation that was injuring the plaintiff's land, the Ninth Circuit cautioned against curtailing socially ben-
26 eficial conduct encouraged by law:

27 > "[A] court of equity [should] be very slow to stop . . . vast operations [when doing so
28 > would] throw[] out of employment thousands of men, practically wip[e] out of existence
> important towns, ruin[] a large number of business men, destroy[] markets for the crops

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> of many farms, and where the business in and of itself is not only not unlawful, but, by the Constitution of the state in which all of the properties in question are situate[d], is expressly given the preferred right over the great industry of agriculture itself, and where, by Congressional legislation as well as by usage, custom, and laws in all of the mining states and territories, it is sanctioned and encouraged."

McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Co., 164 F. 927, 940 (9th Cir. 1908). State courts have applied similar reasoning in nuisance actions regarding a variety of other economically necessary production activities. *See*, *e.g.*, *Appeal of Richards*, 57 Pa. 105, 112 (1868) (declining to enjoin defendant's use of coal to smelt iron because enjoining "the defendants in the use of a material necessary to the successful production of an article of such prime necessity as good iron" would inflict "a greater injury . . . than would result from a refusal to enjoin"); *Clifton Iron Co. v. Dye*, 87 Ala. 468, 471, 470–71 (1889) ("[I]t is not every case of nuisance or continuing trespass which a court of equity will restrain by injunction. In determining this question, the court should weigh the injury that may accrue to the one or the other party, and also to the public, by granting or refusing the injunction."); *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658, 665 (Tenn. 1904) (denying injunction because "the great public interests and benefits to flow from the conversion of these ores into pig metal should not be lost sight of"); *Bliss v. Anaconda Cooper Mining Co.*, 167 F. 342, 371 (Cir. Ct. D. Mont. 1909) (denying injunction because the court found that "thousands of defendants' employees will have to be discharged; . . . the [local] cities will be injured irreparably by the general effect upon internal commerce[;] . . . professional men, banks, business men, working people, hotels, stores, and railroads will be so vitally affected as to cause unprecedented depression in the most populous part of the state; . . . farmers . . . will not have nearly as good markets as they have enjoyed; . . . industry will be driven from the state; and . . . values of many kinds of property will either be practically destroyed or seriously affected"); *Gray v. Grand Trunk W. R. Co.*, 354 Mich. 1, 11 (1958) (denying injunction after "balancing ... the equities of the parties in the interests of the public good").

The rule laid down in these cases is clear: before determining that a defendant's conduct is unreasonable, the court must weigh the harms against the benefits.

B. The Restatement's Commentary Regarding Actions for Damages Does Not Support Plaintiffs' Argument That Balancing Is Unnecessary

Notwithstanding that balancing has always been a central element of nuisance law, Plaintiffs

argued at the May 24 hearing that this Court can ignore the benefits of oil and gas production, finding the entire industry to be a *per se* nuisance—essentially creating a strict liability tort under federal common law. Hr'g Tr. (May 24, 2018) 66:6–12 (Court: "Do we weigh into the calculation the benefit that the world has gotten out of fossil fuels?" Mr. Berman: "We don't."). In support of this novel proposition, Plaintiffs pointed to a single comment in a single section of the Restatement: Section 821B, comment i, titled "Action for damages distinguished from one for injunction." That comment explains that "[a]lthough a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it." Restatement § 821B, cmt. i. Thus, whereas "[i]n an action for injunction the question is whether the activity itself is so unreasonable that it must be stopped," in a damages action a court may find it "reasonable to continue an important activity if payment is made for the harm it is causing." *Id.*

For several reasons, Plaintiffs' are wrong in contending that this Restatement comment eliminates the need to consider the utility of Defendants' conduct.

First and foremost, *this is not a damages action*. Rather, as Plaintiffs' counsel conceded at the hearing, they are asking for "an abatement remedy." Hr'g Tr. 81:8–9. In response to the Court's question whether Plaintiffs had brought "an action for tort damages" or "an action for injunction or abatement," Plaintiffs' counsel responded: "Well, we're—we're in between[.]" Hr'g Tr. 67:9–12. Plaintiffs have studiously avoided requesting damages because "an award of damages is retroactive, applying to past conduct," and thus "for damages to be awarded significant harm must have been actually incurred." Restatement § 821B cmt. i; *see also Helix Land Co. v. City of San Diego*, 82 Cal. App. 3d 932, 950 (1978) ("[Plaintiff] may not recover damages for potential, future injuries arising from the threat of nuisance. The risk of future flooding is not an act. It does not give rise to a cause of action for damages.") (citation and internal quotation marks omitted). But Plaintiffs have not yet incurred, and may never incur, significant harm. Indeed, when asked to describe the injury the cities have suffered thus far, Plaintiffs' counsel could come up with nothing more than that the cities have been "spending money . . . to employ[] outside consultants[] to study global warming." Hr'g Tr. 81:21–82:4; *cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical

future harm that is not certainly impending.").[4]

Second, damages are not available under the federal common law of nuisance. Rather, the Supreme Court has only "recognized the validity of federal common law nuisance actions instituted by one state to *enjoin damaging activities* carried on in another." *Cal. Tahoe Reg'l Planning Agency v. Jennings*, 594 F.2d 181, 193 (9th Cir. 1979) (emphasis added) (collecting cases); *see also AEP*, 564 U.S. at 421 (describing pre-*Erie* decisions "approv[ing] federal common law suits brought by one State to abate pollution emanating from another State"); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 781 (7th Cir. 2011) (holding that federal courts may, in appropriate circumstances, "grant equitable relief to abate a public nuisance that is occurring or to stop a threatened nuisance from arising"). The Supreme Court has not yet decided "whether a cause of action may be brought under federal common law by a private plaintiff, seeking damages." *See Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981). And there "is not a word in the Restatement about public officials recovering damages." Thomas W. Merrill, *Is Public Nuisance a Tort?* 4 J. Tort L. 1, 18 (2011); *id.* at 17 ("[P]ublic nuisance is not historically associated with a damages remedy"); *accord In re Lead Paint Litig*., 924 A.2d 484, 498–99 (N.J. 2007) ("[T]here is no right either historically, or through the Restatement['s] formulation, for the public entity to seek to collect money damages[.]") (citing Restatement § 821C(1)); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 796 (2003) (explaining that historically "[a]ctions for damages were not available" in public nuisance cases). Awarding damages would thus represent a "marked extension" of the federal common law of nuisance. *Jesner v. Arab Bank, PLC*,

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[4] Plaintiffs identified only one case in which a *state* court awarded an "abatement fund"—the recent outlier decision in *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51 (2017). ECF No. 235 at 22 n.52. But even that decision does not support the requested remedy here, because the "abatement fund" there paid for "lead inspections, education about lead hazards, and *remediation of particular lead hazards* inside residences in the 10 [plaintiff] jurisdictions." *ConAgra*, 17 Cal. App. 5th at 79 (emphasis added). Here, by contrast, Plaintiffs want money to build infrastructure to protect against speculative future harms. Moreover, even *ConAgra* involved balancing, as the court there evaluated whether "lead in private homes" could be abated "at a reasonable cost by reasonable means." *Id.* at 109. Plaintiffs also cited *Boomer v. Atlantic Cement*, 26 N.Y.2d 219 (N.Y. 1970), ECF No. 235 at 22 n.52, but that case involved a claim for private nuisance, not public nuisance, and the court did not award an "abatement fund" to pay for future infrastructure projects. Rather, it granted an "injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property present and future caused by defendant's operations." *Id.* at 225. In other words, the court awarded damages backed up by the threat of an injunction. Here, by contrast, Plaintiffs have requested neither damages *nor* an injunction.

138 S. Ct. 1386, 1402 (2018) (citation omitted).

Third, the test Plaintiffs want this Court to apply *still* requires a balancing inquiry. The very comment on which Plaintiffs rely states that "[i]n determining whether to award damages, the court's task is to decide whether it is *unreasonable* to engage in the conduct without paying for the harm done." Restatement § 821B, cmt. i (emphasis added). And Section 829A, which Plaintiffs cited in their remand motion, provides that "[a]n intentional invasion of another's interest in the use and enjoyment of land is *unreasonable* if the harm resulting from the invasion is severe and greater than the other *should be required* to bear without compensation." Restatement § 829A (emphasis added). Both of these tests are value-laden policy determinations that balance costs against benefits. In fact, Section 829A is merely a "specific application of the general rule stated in § 826," *id.* cmt. b, which requires balancing. And the commentary on Section 829A confirms that its test is merely a variation on the balancing that typifies nuisance cases: "Thus, in *determining whether the gravity of the interference with the public right outweighs the utility of the actor's conduct* (see § 826, Comment a), the fact that the harm resulting from the interference is severe and greater than the other *should be required to* bear without compensation will *normally* be sufficient to make the interference unreasonable." *Id.*, cmt. a. (emphasis added). Section 829A thus merely reflects the common-sense notion that "the more serious the harm is found to be, the more likely it is that the trier of fact will hold that the invasion is unreasonable." *Id*. cmt. b.[5] Plaintiffs' request for a strict liability nuisance tort that eliminates the reasonableness inquiry entirely thus has no basis in law.[6]

[5] The illustrations cited in Section 829A involve situations where the defendant engaged in activity that had already caused direct, severe harm to the adjacent plaintiff, such as where "A's smelter produces sulphurous fumes that waft over B's adjoining farm, killing some of his crops and severely damaging others," or where "A's factory produces severe vibrations that reach B's house 100 feet away," which "shake window panes loose, cause ceilings to fall and produce cracks in the plaster." Restatement § 829A (Illustrations). These examples do not suggest that the Court can ignore the utility of Defendants' conduct here, where Plaintiffs are seeking billions of dollars to abate speculative *future* harms they claim will result from an attenuated causal chain—that includes Plaintiffs themselves—involving billions of third parties independently acting over several decades relating to activity that was authorized, indeed encouraged, by the federal and state governments.

[6] In their opposition to Defendants' motion to dismiss, Plaintiffs cited *Wood v. Picillo*, 443 A.2d 1244 (R.I. 1982), for the proposition that "liability in nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct." ECF No. 235 at 15 n.30 (quoting *Picillo*, 443 A.2d at 1247). But Plaintiffs' omitted the first part of the quoted sentence, which made clear that the court was simply "[d]istinguish[ing]" nuisance "from negligence liability." *Picillo*, 443 A.2d at 1247. The

Fourth, the Restatement makes clear that Plaintiffs' preferred test does not apply if the damages Plaintiffs seek would "make the continuation of the conduct not feasible," because then the damages award would be akin to an injunction. Restatement § 826(b); *see also* Restatement § 826, cmt. f; *Int'l Paper Co. v Ouellette*, 479 U.S. 481, 495 (1987) (award of damages would force defendant "to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability"); *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) ("[T]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy") (citation omitted). In conducting that feasibility analysis, courts must take account of "the financial burden of compensating for this *and similar harm to others*." Restatement § 826(b). Here, that would mean taking into consideration not only this one lawsuit—which involves two plaintiffs, each demanding billions of dollars—but also the cost of compensating *every other plaintiff* that has brought or could bring similar claims, including the plaintiffs in the eight other global warming-based nuisance cases pending in courts around the country against the same five Defendants.[7] Because the "imposition of this financial burden would make continuation of the activity not feasible, the weighing process for determining unreasonableness" is the proper analysis. Restatement § 826, cmt. f.[8]

In short, there is no way for the Court to adjudicate Plaintiffs' public nuisance claims without balancing Plaintiffs' alleged harms against the "huge benefit" of Defendants' fossil-fuel extraction. Hr'g Tr. 68:12–14 (Court: "And so we have gotten a huge benefit from the use of fossil fuels; right?"

question here is not whether Defendants' acted negligently (they plainly did not), but whether the alleged interference with public rights was unreasonable, which requires balancing.

[7] *See Cty. of San Mateo v. Chevron Corp., et al.*, No. 17-cv-4929 (N.D. Cal.); *City of Imperial Beach v. Chevron Corp., et al.*, No. 17-cv-4934 (N.D. Cal.); *Cty. of Marin v. Chevron Corp., et al.*, No. 17-cv-4935 (N.D. Cal.); *Cty. of Santa Cruz v. Chevron Corp., et al.*, No. 18-cv-450 (N.D. Cal.); *City of Santa Cruz v. Chevron Corp., et al.*, No. 18-cv-458 (N.D. Cal.); *City of Richmond v. Chevron Corp., et al.*, No. 18-cv-732 (N.D. Cal.); *City of New York v. BP P.L.C., et al.*, No. 18-cv-182 (SDNY); *King County v. BP P.L.C., et al.*, No. 18-2-11859-0 (Sup. Ct. King Cty., Wash.).

[8] The cases cited in Restatement § 826(b) illustrate that the reasonableness of the defendant's conduct is still critical in an action for damages. For example, in *Ferguson v. City of Keene*, 111 N.H. 222 (1971), the court held that the "circumstances" relevant to determining whether it was "reasonable to require [the plaintiff] to bear [the injury] without compensation" included "balancing the utility of the use against the gravity of the harm suffered by the plaintiff[.]" *Id.* at 224–25 (citation omitted). In *Cox v. Schlachter*, 147 Ind. App. 530 (1970), the court held that the defendant's mice farm, which provided mice for scientific research, was a nuisance despite its "vital utility to all people" because "the lax and negligent manner in which [the defendant] conducted sanitation procedures in relation to surrounding residents" rendered the interference unreasonable. *Id.* at 535.

Mr. Berman: "Correct."). Moreover, because Plaintiffs have alleged that the "the key tortious decision . . . at issue in this case" is "the decision to produce company-wide levels of fossil fuels that are massive," the Court would also need to determine *what amount* of fossil-fuel extraction is reasonable. Hr'g Tr. 30:2–4; *see also id.* 14:20–21; 30:23–25. Because that type of balancing is the province of Congress and the Executive Branch, Plaintiffs' claims should be dismissed. ECF No. 225 at 8–14, 23–25.

III. CONCLUSION

In *Jesner*, the Supreme Court reiterated its "general reluctance to extend judicially created private rights of action," and it urged courts to "exercise 'great caution' before recognizing new forms of liability[.]" 138 S. Ct. at 1402–03. This Court should thus decline Plaintiffs' invitation to create a novel strict-liability nuisance that ignores the enormous public benefits of Defendants' lawful conduct. For these reasons, those set forth in the Defendants' Motion to Dismiss, and those made at the May 24, 2018 hearing, the Court should dismiss these actions.

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Respectfully submitted,

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** Pursuant to Civ. L.R. 5-1(i)(3), the electronic signatory has obtained approval from this signatory