GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutrous, Jr., *pro hac vice*
tboutrous@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: 213.229.7000
Facsimile: 213.229.7520

WATANABE ING LLP
Melvyn M. Miyagi #1624-0
mmiyagi@wik.com
Ross T. Shinyama #8830-0
rshinyama@wik.com
Joyce W.Y. Tam-Sugiyama #10325-0
jtam@wik.com
999 Bishop Street, Suite 1250
Honolulu, HI 96813
Telephone: 808.544.8300
Facsimile: 808.544.8399

Attorneys for Defendants
CHEVRON CORPORATION
and CHEVRON U.S.A., INC.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

CITY AND COUNTY OF HONOLULU, Plaintiff, v. SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL	CASE NO.: 20-cv-00163-DKW-RT **DEFENDANTS’ RESPONSE TO BRIEFING ORDER** [Related to Docket No. 24] [Removal from the Circuit Court of the First Circuit, State of Hawai‘i] Action Filed: March 9, 2020

PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA INC.; BHP GROUP LIMITED; BHP GROUP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive,

Defendants.

DEFENDANTS' RESPONSE TO BRIEFING ORDER

(Remainder of page intentionally left blank.)

On April 17, 2020, the parties filed a joint Stipulation providing, among other things, that Plaintiff would have until May 15, 2020 to file a notice of motion to remand, and until June 15, 2020 to file a motion to remand. Dkt. 9 at 5. On April 20, 2020, the Court directed the parties to "(1) identify all appeals that are relevant to the facts and issues in this case and which are currently pending before any United States Court of Appeals or the United States Supreme Court; (2) state the issues presented in the appeal(s); and (3) address the propriety of a stay of the proceedings in this case pending the resolution of the appeal(s)." Dkt. 24.

As explained below, there are currently six appeals pending in five federal courts of appeal, as well as a petition for a writ of certiorari pending before the Supreme Court, that arise from cases that, like this one, seek to hold energy companies liable for damages allegedly resulting from global climate change. Two of those appeals are pending in the Ninth Circuit and were argued on February 5, 2020.[1] If defendants prevail in these appeals, this Court's jurisdiction would be confirmed. However, the converse is not true—decisions in favor of plaintiffs could have little effect on whether to remand this case because (1) the Ninth Circuit may potentially address only a limited number of the removal grounds asserted here, and (2) Defendants' Notice of Removal presents new facts and authority that support federal jurisdiction above and beyond those raised in the cases now on appeal. This

[1] These appeals were assigned to and heard by the same three-judge panel.

Court will need to consider those matters even if the pending appeals are decided against defendants.

For these reasons, Defendants believe that a stay of remand briefing would not necessarily promote judicial efficiency and propose to brief remand in accordance with the schedule set forth in the parties' joint Stipulation. If the Court enters a stay, Defendants propose the Court also order that the parties meet and confer promptly after an opinion is rendered by the Ninth Circuit in either of the pending appeals and submit to the Court their position(s) on an appropriate course of action.[2]

I. PENDING APPEALS AND ISSUES PRESENTED

This case is one of 15 lawsuits across the country filed by state and local governments and trade associations, ostensibly under state law, seeking to hold energy companies liable for harms allegedly attributable to global climate change.[3]

---

[2] This submission does not operate as an admission of any factual allegation or legal conclusion and is submitted subject to and without waiver of any right, defense, affirmative defense, claim, or objection, including lack of personal jurisdiction, insufficient process, or insufficient service of process.

[3] *See Cty. of San Mateo v. Chevron Corp*, No. 17-cv-4929 (N.D. Cal.); *City of Imperial Beach v. Chevron Corp.*, No. 17-cv-4934 (N.D. Cal.); *Cty. of Marin v. Chevron Corp.*, No. 17-cv-4935 (N.D. Cal.); *Cty. of Santa Cruz v. Chevron Corp.*, No. 18-cv-450 (N.D. Cal.); *City of Santa Cruz* v. *Chevron Corp.*, No. 18-cv-458 (N.D. Cal.); *City of Richmond v. Chevron Corp.*, No. 18-cv-732 (N.D. Cal.); *City of Oakland v. BP P.L.C.*, No. 17-cv-6011 (N.D. Cal.); *City and Cty. of San Francisco v. BP P.L.C.*, No. 17-cv-6012 (N.D. Cal.); *Pacific Coast Fed. of Fishermen's Ass'ns v. Chevron Corp.*, No. 3:18-cv-07477 (N.D. Cal.); *State of Rhode Island* v. *Chevron Corp.*, No. PC-2018-4716 (R.I. Super.); *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 24-C-18-004219 (Md. Cir.); *King County v. BP P.L.C.*, No. 2:18-cv-00758-RSL (W.D. Wash.); *City of New York v. BP*

There are now six appeals pending in five different federal courts of appeals, as well as a petition for a writ of certiorari pending before the Supreme Court:[4]

1. *County of San Mateo v. Chevron Corp.*, Nos. 18-15499+ (9th Cir.) (argued Feb. 5, 2020): The district court (Chhabria J., N.D. Cal.) granted plaintiffs' motion to remand six related cases on the ground that it lacked subject-matter jurisdiction. Defendants' appeal presents three questions:

- "Whether 28 U.S.C. § 1447(d), which states that 'an order remanding a case to the State court from which it was removed pursuant to section 1442 . . . of this title shall be reviewable by appeal or otherwise,' permits [the Ninth Circuit] to review the entirety of the district court's remand orders, where cases were removed on bases including 28 U.S.C. § 1442(a)(1)";

- "Whether [the Ninth Circuit] has jurisdiction to review the district court's remand orders notwithstanding 28 U.S.C. § 1447(d) because the district court's rulings were based on a merits determination, not an absence of subject matter jurisdiction"; and

- "Whether there is federal jurisdiction over Plaintiffs' global-warming based tort claims."

P.L.C., No. 18-cv-00182-JFK (S.D.N.Y.); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, No. 2018CV30349 (Colo. Dist. Ct.).

[4] Two cases—*Pacific Coast Fed.* and *King County*—were stayed pending resolution of the Ninth Circuit appeals; however, this case is different in key respects. First, this case involves several Defendants not named in any other pending case, including Aloha Petroleum Ltd. and BHP Hawaii Inc., who have not had the opportunity to litigate removal issues at all yet. Second, Defendants here raise additional factual bases that were not previously raised in other cases. Third, plaintiff in *King County* did *not* file a motion to remand; rather, the Court stayed further briefing on motions to dismiss on the ground that the issues were "identical" to those in *City of Oakland*, where all defendants were also parties. Fourth, *Pacific Coast Fed.* was assigned to Judge Chhabria who had previously issued remand decisions in the six similar cases pending before him, which involved overlapping defendants

Dkt. 77 at 4. If the Ninth Circuit decides in defendants' favor on one or more of these issues and holds that remand was improper, then its decision would confirm this Court's jurisdiction. However, if the Ninth Circuit determines that it has jurisdiction to consider the propriety of removal only under the federal-officer removal statute, 28 U.S.C. § 1442, to the exclusion of all other grounds for removal,[5] its decision would not provide guidance on the seven other grounds for removal asserted by Defendants there and in the present case before this Court. Moreover, Defendants here raise additional facts and authorities for removal that are not at issue in *San Mateo*.

2. *City of Oakland v. B.P. P.L.C.*, No. 18-16663 (9th Cir.) (argued Feb. 5, 2020): The district court (Alsup J., N.D. Cal.) denied plaintiffs' motion to remand two consolidated cases, finding that plaintiffs' purportedly state-law claims necessarily arose under federal common law, meaning federal-question jurisdiction existed (the court did not reach the other grounds for removal asserted by defendants). The court then granted defendants' motion to dismiss for failure to state a claim, holding that plaintiffs' claims interfered with separation of powers and foreign policy,

[5] Plaintiffs contend that *Patel v. Del Taco, Inc*, 446 F.3d 996 (9th Cir. 2006) limits the Ninth Circuit's review to federal officer grounds. That position is wrong and should be rejected—defendants maintain that *Patel* is not controlling because the question whether § 1447(d) authorizes review of the whole order when a case is removed under § 1442(a) was neither presented nor decided in that case.

impermissibly attempted to regulate extraterritorial conduct, and that claims based on domestic products were displaced by the Clean Air Act. The court also granted certain Defendants' motion to dismiss for lack of personal jurisdiction. Plaintiffs' appeal presents three questions:

- "Whether the district court erred in denying the [Plaintiff's] motion to remand on the ground that their state law claims were 'necessarily governed by' (and thus arose under) 'federal [common] law'";
- "Whether the district court erred in dismissing the [Plaintiff's] public nuisance claims under Rule 12(b)(6) on the ground that adjudication of those claims would violate the 'presumption against extraterritoriality' and raise 'foreign policy' concerns"; and
- "Whether the district court erred in declining to exercise specific personal jurisdiction over four Defendants on the ground that the [Plaintiff's] did not adequately allege that those Defendants' production, sale, and misleading promotion of fossil-fuel products was a cause of the challenged public nuisance."

Dkt. 30 at 2–3. If the Ninth Circuit's decision is limited to addressing the sole basis for the district court's denial of plaintiff's remand motion—*i.e.*, that the claims are governed by federal common law—it will address just one of the multiple bases for removal that Defendants have presented here.[6] It is also possible that the Ninth Circuit could find federal jurisdiction exists because plaintiffs ultimately amended their complaint to add a federal common law cause of action, and thus not address any of the bases for removal presented here.

[6] *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) ("Generally, we do not consider an issue not passed upon below.") (internal quotation omitted).

3. *City of New York v. BP p.l.c.*, No. 18-2188 (2d Cir.) (argued Nov. 22, 2019): Plaintiff filed this action in federal court. The district court (Keenan J., S.D.N.Y.) granted defendants' motion to dismiss, holding that plaintiff's purportedly state-law claims arose under federal common law, but were displaced by the Clean Air Act to the extent they involve domestic oil-and-gas production, and barred by the presumption against extraterritoriality and the foreign policy doctrine to the extent they involve foreign production. Plaintiff's appeal presents three questions:

- "Did the district court err by holding that federal common law displaced the state-law claims that the City pleaded?";
- "Did the district court err by holding that the City's claims were barred by the Clean Air Act?"; and
- "Did the district court err by concluding that separation-of-powers concerns warranted dismissal of the City's claims?"

Dkt. 89 at 3.

4. *Rhode Island v. Shell Oil Prods. Co., LLC*, No. 19-1818 (1st Cir.): The district court (Smith J., D.R.I.) granted plaintiff's motion to remand on the ground that it lacked subject-matter jurisdiction. Defendants' appeal presents two questions:

- "Whether 28 U.S.C. § 1447(d), which states that 'an order remanding a case to the State court from which it was removed pursuant to section 1442 . . . of this title shall be reviewable by appeal or otherwise,' permits [the First Circuit] to review the entirety of the district court's remand order, where 28 U.S.C. § 1442 was one of several bases for removal"; and
- "Whether federal removal jurisdiction exists over Plaintiff's global warming-based tort claims."

Appellants' Opening Brief at 4. As in *San Mateo*, the First Circuit could limit its review solely to the federal-officer removal ground and not address any of the other removal grounds advanced by Defendants. Argument has not yet been scheduled.

5. *Board of County Commissioners of Boulder v. Suncor Energy*, No. 19-1330 (10th Cir.) (argument scheduled for May 6, 2020): The district court (Martinez J., D. Colo.) granted plaintiffs' motion to remand on the ground that it lacked subject-matter jurisdiction. Defendants' appeal presents two questions:

- "Whether 28 U.S.C. § 1447(d) permits this Court to review the entirety of a district court's remand order where the removing defendants premised removal in part on the federal-officer removal statute, 28 U.S.C. § 1442"; and

- "Whether the district court had jurisdiction over appellees' climate-change-related tort claims, permitting appellants to remove this case from state to federal court."

Appellants' Opening Brief at 1. As in *San Mateo* and *Rhode Island*, the Tenth Circuit could limit its review solely to the federal-officer removal ground and not address any of the other removal grounds advanced by Defendants.

6. *Mayor and City Council of Baltimore v. BP p.l.c.*, No. 19-1644 (4th Cir.) (petition for writ of certiorari pending): The district court (Hollander J., D. Md.) granted plaintiff's motion to remand on the ground that it lacked subject-matter jurisdiction. The Fourth Circuit affirmed, holding first that, under prior precedent, it lacked jurisdiction to consider any ground for removal other than federal-officer removal—the same threshold question presented in *San Mateo*, *Rhode Island*, and

Boulder. The court then held that removal under the federal-officer removal statute was improper primarily because, in its view, plaintiff challenged only "the promotion and sale of fossil fuel products . . . abetted by a sophisticated disinformation campaign," which did not occur under the direction of a federal officer. *Mayor and City Council of Baltimore v. BP P.L.C.*, 952 F3d 452, 467 (4th Cir. 2020). The court acknowledged, however, that "[i]f production and sales went to the heart of Baltimore's claims, we might be inclined to think otherwise." *Id.* at 468.

On March 31, 2020, Defendants filed a petition for a writ of certiorari in the United States Supreme Court presenting the threshold question:

- "Whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443."

See Pet. at 1, *BP p.l.c. v. Mayor and City Council of Baltimore*, No. 19-1189 (U.S.). The petition explained that the Fourth Circuit's narrow view of its jurisdiction conflicts with the rule in the Fifth, Sixth, and Seventh Circuits, which permit review of all bases for removal, not just federal-officer and civil-rights removal arguments. Other Circuits have, however, taken the opposite view and limited appellate jurisdiction to federal-officer and civil-rights removal arguments.

II. PROPRIETY OF A STAY

It is rather uncertain whether any of the pending appeals will shed much light

on this Court's jurisdiction. A resolution in favor of defendants in these appeals would confirm this Court's jurisdiction, but the converse is not true. As explained above, threshold questions regarding the courts of appeals' jurisdiction to review remand orders under 28 U.S.C. § 1447(d) may substantially limit those courts—including the Ninth Circuit—to addressing only the federal-officer removal statute (which is just one of the eight grounds for removal asserted by Defendants in this case), as the Fourth Circuit did in *Mayor and City Council of Baltimore*. Even if that does not happen, this case still presents additional facts and authorities that are not at issue in the pending appeals.[7] For these reasons, Defendants propose to brief remand consistent with the schedule set forth in the parties' previously filed Stipulation, and respectfully submit that the interests of expediency and efficiency counsel in favor of doing so.

---

[7] For example, Defendants' Notice of Removal in this case contains many additional factual bases to support removal under the federal-officer removal statute as compared to the other Ninth Circuit cases, including contracts between the federal government and predecessors of Chevron and Shell for the production of "avgas" during World War II (Dkt. 1 ¶ 59), orders issued under the Defense Production Act of 1950 requiring the operation of refineries and the production of petroleum products during the Korean War (*id.* ¶ 60), arrangements for the provision of "military-unique petroleum-based products" coordinated by the Defense Energy Support Center in the present day (*id.* ¶ 62), and production and transportation of fuel to the Red Hill Bulk Storage Facility which has been used for over 75 years for military operations originating on Oahu (*id.* ¶ 84). It also includes additional legal authority demonstrating that Plaintiff's claims are governed by federal common law, and additional factual bases to support removal under the Outer Continental Shelf Lands Act and federal enclave statutes. *See, e.g.*, *id.* ¶¶ 20, 22, 52–53, 57, 69, 83–86.

Notably, this case does not arise in a typical stay posture, where an issue that is pending before one district court comes to be presented to the relevant circuit court through appeal of another case. Instead here, while the above-listed appeals were already pending and *sub judice*, Plaintiff (and its same counsel) elected to commence this new suit. Since Plaintiff initiated this suit under circumstances where the appeals were already extant, the factors here weigh in favor of proceeding with adjudication of the remand and dismissal motions, especially since a ruling in favor of plaintiffs in any of the appeals will *not* be dispositive here.[8]

If the Court elects to defer remand briefing until after one or both of the pending Ninth Circuit appeals are resolved, Defendants propose that the Court also order the parties to meet and confer within 14 days of a decision on either or both of the Ninth Circuit appeals and endeavor to submit a joint position statement on the continuing propriety of a stay and a schedule for briefing remand. If the parties are not able to agree on a position, they would submit separate proposals to the Court.

In short, Defendants' position remains that, consistent with the parties' joint Stipulation, the proper course is to brief remand now, but Defendants are, of course, willing to proceed in the manner this Court believes is most appropriate.

---

[8] Of course, if the Ninth Circuit were to address any issues relevant to this Court's determinations, the parties will promptly advise the Court and address that decision in their briefs or through a short supplemental brief if remand briefing is completed.

Respectfully submitted,

DATED: Honolulu, Hawaii, April 30, 2020.

By: */s/ Melvyn M. Miyagi*
Melvyn M. Miyagi
Ross T. Shinyama
Joyce W.Y. Tam-Sugiyama
WATANABE ING LLP

Theodore J Boutrous, Jr. (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP

Attorneys for Defendants
Chevron Corporation
and Chevron U.S.A., Inc.

By: */s/ Breon S. Peace*
Breon S. Peace (*pro hac vice*)
Victor L. Hou (*pro hac vice*)
Boaz S. Morag (*pro hac vice*)
CLEARY GOTTLIEB STEEN AND
HAMILTON LLP

Margery S. Bronster
Rex Y. Fujichaku
Kevin A Morris
BRONSTER FUJICHAKU ROBBINS

Attorneys for Defendants
BHP Group Limited, BHP
Group plc, and BHP Hawaii Inc.

By: */s/ C. Michael Heihre*
C. Michael Heihre 1307-0
Michi Momose 9777-0
CADES SCHUTTE

J. Scott Janoe (*pro hac vice*)
Matt Allen (*pro hac vice*)
Megan Berge (*pro hac vice*)
BAKER BOTTS LLP

Attorneys for Defendants
Sunoco LP, Aloha Petroleum, LTD.,
and Aloha Petroleum LLC

By: */s/ Paul Alston*
Paul Alston
Claire Wong Black
John-Anderson L. Meyer
Glenn T. Melchinger
DENTONS

Theodore V. Wells, Jr. (*pro hac vice*)
Daniel Toal (*pro hac vice*)
Yahonnes Cleary (*pro hac vice*)
Caitlin Grusauskas (*pro hac vice*)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

Attorneys for Defendants
Exxon Mobil Corporation and
ExxonMobil Oil Corporation

By: */s/ Joachim P. Cox*
Joachim P. Cox
Randall C. Whattoff
COX FRICKE LLP

Attorneys for Defendants
Royal Dutch Shell Plc,
Shell Oil Company, and
Shell Oil Products Company LLC

By: */s/ Lisa Woods Munger*
Lisa Woods Munger
Lisa A. Bail
David J. Hoftiezer
GOODSILL ANDERSON
QUINN & STIFEL LLP

Attorneys for Defendants
BP plc and BP America Inc.

By: /s/ Ted N. Pettit
Ted N. Pettit
CASE LOMBARDI & PETTIT

Shannon S. Broome (*pro hac vice*)
Shawn Patrick Regan (*pro hac vice*)
HUNTON ANDREWS KURTH LLP

Attorneys for Defendant
Marathon Petroleum Corp.

By: */s/ Crystal K. Rose*
Crystal K. Rose
Adrian L. Lavarias
David A. Morris
BAYS, LUNG, ROSE & HOLMA

Jameson R. Jones (*pro hac vice*)
Daniel R. Brody (*pro hac vice*)
Sean C. Grimsley (*pro hac vice*)
BARTLIT BECK LLP

Attorneys for Defendants
ConocoPhillips and
ConocoPhillips Company