IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,

Plaintiff,

v.

BP AMERICA INC., BP P.L.C., CHEVRON CORPORATION, CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, XTO ENERGY INC., HESS CORPORATION, MARATHON OIL CORPORATION, MARATHON OIL COMPANY, MARATHON PETROLEUM CORPORATION, MARATHON PETROLEUM COMPANY LP, SPEEDWAY LLC, MURPHY OIL CORPORATION, MURPHY USA INC., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, CITGO PETROLEUM CORPORATION, TOTAL S.A., TOTAL SPECIALTIES USA INC., OCCIDENTAL PETROLEUM CORPORATION, DEVON ENERGY CORPORATION, APACHE CORPORATION, CNX RESOURCES CORPORATION, CONSOL ENERGY INC., OVINTIV, INC., and AMERICAN PETROLEUM INSTITUTE,

Defendants.

Civil Action No. 20-cv-01429-LPS

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants write to inform the Court of the Second Circuit's decision in *City of New York v. Chevron Corp., et al.*, __ F.3d __, 2021 WL 1216541 (2d Cir. Apr. 1, 2021), which affirmed the dismissal of an action that, like this one, sought to hold energy producers liable for climate change-related harms under state tort law.[1] In doing so, the Second Circuit specifically held that the plaintiff engaged in "artful pleading" by attempting to "transform the City's Complaint into anything other than a suit over global greenhouse gas emissions." *Id.* at *5. That decision is relevant to this case for at least three reasons.

First, *City of New York* supports Defendants' argument that this case was properly removed under the Court's federal-question jurisdiction because the court found that "Plaintiff's claims necessarily arise under federal, not state, law, because they seek to regulate transboundary and international emissions and pollution." Dkt. 96 at 16. As the Second Circuit explained, "[g]lobal warming presents a uniquely international problem of national concern [and] is therefore not well-suited to the application of state law," *City of New York*, 2021 WL 1216541, at *6, and as a result, claims seeking damages for the alleged impacts of global climate change "must be brought under federal common law," *id.* at *9. And while Plaintiff insists that federal-question jurisdiction does not exist over this action because, "[u]nder the cardinal 'well-pleaded complaint rule,' 'federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint,'" Dkt. 89 at 7, *City of New York* held that the plaintiff's claims were necessarily governed by federal common law despite being pleaded under state law, expressly rejecting the plaintiff's effort to disguise "those federal claims" as state-law claims, *City of New York*, 2021 WL

[1] This Notice of Supplemental Authority is submitted subject to, and without waiver of, any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

1216541, at *9.; *see also id.* at *5 ("Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions.").[2]

The Second Circuit also agreed with Defendants that, insofar as the Clean Air Act displaces federal common law in this action, this displacement does not resuscitate Plaintiff's purported state-law claims. *Cf.* Dkt. 89 at 11 ("Defendants' federal common law theory fails because the [Clean Air Act] displaced whatever federal common law might once have related to greenhouse gas emissions.") In particular, the Second Circuit followed the two-step framework advocated by Defendants here by first evaluating whether federal or state law governed the plaintiff's claims (answer: federal), and only then considering whether the plaintiff had a valid claim under that law (answer: no). *See City of New York*, 2021 WL 1216541, at *5–12. And while the plaintiff in *City of New York* filed its complaint in federal court, such that the case did not present the same removal question at issue here, *see id.* at *8, the Second Circuit's rationale in disposing of the plaintiff's claims *on the merits* on the ground that they necessarily arise under federal law clearly supports Defendants' argument on removal.

Second, *City of New York* supports Defendants' argument that federal jurisdiction exists under the federal officer removal statute, the Outer Continental Shelf Lands Act, and federal enclave jurisdiction. In opposing removal on these grounds, Plaintiff in this case—like the plaintiff

[2] When a claim "arise[s] under federal common law," there "is a permissible basis for jurisdiction based on a federal question." *Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007). For this reason, any attempt to distinguish *City of New York* on the ground that it addressed a dismissal on the merits, whereas here the question before the Court is the propriety of removal, must fail. Although the Second Circuit specifically reserved the issue of removal, its logic compels federal jurisdiction in this case. That is because once the Court concludes that Plaintiff's claims "must be brought under federal common law," *City of New York*, 2021 WL 1216541, at *9, it necessarily follows that there "is a permissible basis for jurisdiction based on a federal question," *Treiber & Straub*, 474 F.3d at 383; *see also City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("[I]f federal common law exists, it is because state law cannot be used.").

in *City of New York*—tries to recast its claims as going only to Defendants' *marketing* of fossil-fuel products, rather than the production, sale, and combustion of those products. *See id.* at *13. In particular, it contends that removal is improper because Defendants did not engage in any marketing under the direction or control of federal officers, *see* Dkt. 89 at 28–32, or in marketing on the Outer Continental Shelf or federal enclaves, *see id.* at 50–51, 56. But as the Second Circuit explained, "emissions [are] the singular source of the City's harm," and "[g]reenhouse gases once emitted become well mixed in the atmosphere," at which point they "cannot be traced back to their source." *City of New York*, 2021 WL 1216541, at *5–6. As a result, the Second Circuit held that the plaintiff's claims were inseparable from activities occurring worldwide: "In other words, the City requests damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet." *Id.* at *6. Although the plaintiff in *City of New York*, like Plaintiff here, tried to focus on a different "link in 'the causal chain' of the City's damages," *id.* at *5, the Second Circuit squarely rejected this as "[a]rtful pleading," *id.* at *5; *see also id.* at *11 ("[T]he City's focus on this 'earlier moment' in the global warming lifecycle is merely artful pleading and does not change the substance of its claims.").

Moreover, claims like Plaintiff's here will necessarily impact the worldwide production of fossil fuels. As the Second Circuit explained, "while the City is not expressly seeking to impose a standard of care or emission restrictions on the Producers, the goal of its lawsuit is perhaps even more ambitious: to effectively impose strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who released them)." *Id.* at *7. This necessarily includes, among other things, the production of fossil fuels from the Outer Continental Shelf and under the direction, supervision, and control of federal officers—and, as *City of New York* confirms, necessarily "threatens to impair the total recovery of the federally-

owned minerals" on the Outer Continental Shelf. Dkt. 96 at 32 (quoting *EP Operating Ltd. v. Placid Oil Co.*, 26 F.3d 563, 570 (5th Cir. 1994)). After all, "[i]f the Producers want to avoid all liability, then their only solution would be to cease global production altogether." *City of New York*, 2021 WL 1216541, at *7.

Because Plaintiff's claims involve the production, sale, and combustion of fossil fuels—which occurred under the direction, supervision, and control of federal officers, and which occurred on the Outer Continental Shelf and federal enclaves—Plaintiff's motion to remand should be denied.

Third, City of New York supports Defendants' argument that federal jurisdiction exists under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,* 545 U.S. 308 (2005) because Plaintiff's claims here, like those asserted in New York, "attempt to supplant federal energy policy, exercise the federal foreign affairs power, and regulate Defendants' speech over matters of public concern." Dkt. 96 at 22. As the Second Circuit recognized, "greenhouse gas emissions are the subject of numerous federal statutory regimes and international treaties" that "provide interlocking frameworks for regulating greenhouse gas emissions, as well as enforcement mechanisms to ensure that those regulations are followed." *City of New York*, 2021 WL 1216541, at *1; *id.* at *6 (finding that these claims "implicat[e][] . . . our relations with foreign nations"). Plaintiff "has sidestepped those procedures and instead instituted a state-law tort suit . . . to recover damages caused by those companies' admittedly legal commercial conduct in producing and selling fossil fuels around the world." *Id.* But "in so doing, [Plaintiff] effectively seeks to replace these carefully crafted frameworks—which are the product of the political process—with a patchwork of claims under state nuisance law." *Id.* The Second Circuit emphatically rejected this position, holding that it could not "condone such an action." *Id*.

Respectfully submitted,

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