UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CITY OF NEW YORK, Plaintiff, v. EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., and AMERICAN PETROLEUM INSTITUTE, Defendants.	Case No. 21-cv-04807 (VEC)

DEFENDANTS' RESPONSE TO THE CITY'S
NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants write in response to the City of New York's (the "City") notice (Dkt. 51) regarding the district court's decision on the plaintiff's motion to remand in *City of Hoboken* v. *Exxon Mobil Corp.*[1] *See* Opinion ("*Hoboken* Order"), Case No. 20-cv-14243 (D.N.J. Sept. 8, 2021) (attached as Exhibit A to the notice, Dkt. 51-1). Defendants submit that the *Hoboken* Order is incorrect, and they have appealed it to the Third Circuit. Neither this Court nor the Second Circuit has yet addressed many of the issues relevant to the pending motion to remand in this case, and the *Hoboken* Order is not persuasive for many reasons including, but not limited to, the following.[2]

[1] By filing this response, Defendants do not waive any right, defense, affirmative defense, or objection, including any challenges to personal jurisdiction over Defendants.

[2] The *Hoboken* court stayed its remand order so that the defendants could file a formal motion to stay pending their appeal to the Third Circuit. *See* Order, Case No. 20-cv-14243 (D.N.J. Sept. 9, 2021) (attached as Exhibit 1). As the *Hoboken* court explained, "Defendants removed [*Hoboken*], in part, under the federal officer removal statute and the Class Action Fairness Act," and "both of these statutes provide a statutory right to appeal a remand order that addresses these bases for removal." *Id*. at 1 (citations omitted). And because the Third Circuit (like the Second Circuit) has

First, the *Hoboken* court misunderstood the defendants' argument that the plaintiff's claims necessarily "arise under" federal common law and therefore present a removable "federal question." Instead, the *Hoboken* court analyzed the issue under "ordinary preemption" principles, and concluded that, on that basis, removal was improper. *Hoboken* Order at 9. This was error. Courts determine at the outset whether a plaintiff's claims arise under federal or state law; this analysis does not implicate preemption principles or standards. *See United States* v. *Standard Oil Co.*, 332 U.S. 301, 307 (1947). Because the *Hoboken* court incorrectly considered this issue as a preemption defense, it did not address whether the claims were actually governed by federal common law. If it had, the court would have concluded that they are, just as the Second Circuit recently held that such claims "must be brought under federal common law"—and thus raise, if at all, "federal claims." *City of New York* v. *Chevron Corp.*, 993 F.3d 81, 95 (2d Cir. 2021). Although the Second Circuit held such claims are ultimately not viable, *see id.* at 98, 103, because Hoboken's complaint, just as the City's Complaint here, likewise "raises claims arising under federal law," the action is removable, *Home Depot U.S.A., Inc.* v. *Jackson*, 139 S. Ct. 1743, 1748 (2019).

The *Hoboken* court instead concluded that the claims would not be removable even if they were governed by federal common law, but it did so based on a misunderstanding of *National Farmers Union Insurance Companies* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985). Specifically, the *Hoboken* court attributed incorrect significance to the fact that, in that case, the plaintiffs "filed their complaint in federal court." *Hoboken* Order at 10-11. But the Supreme Court expressly held that there is "federal question" jurisdiction over "claims founded upon federal common law as well

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not yet "addressed Defendants' arguments," staying the case pending appeal "is prudent to preserve resources and in light of considerations of judicial economy. Specifically, the Third Circuit will be presented with matters of first impression that could potentially impact the [*Hoboken*] Court's remand Order." *Id.* at 2.

as those of statutory origin." *National Farmers Union*, 471 U.S. at 850, 852. And the *Hoboken* court ignored the decisions from multiple courts of appeals that have held that federal common law provides 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); *see also Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 924, 931 (5th Cir. 1997) (concluding "removal is proper" because plaintiff's pleaded state-law claims "arose under federal common law").

Second, the *Hoboken* court concluded that the plaintiff's claims were not "focused on" the defendants' actions under federal officers, and therefore were not removable under the Federal Officer Removal statute. *Hoboken* Order at 20. But it was improper to focus exclusively on the plaintiff's theory of "deception" because, as the Supreme Court and the Second Circuit have held, when both parties have reasonable theories of the case, the defendants' theory must be credited for purposes of federal officer removal. *See, e.g.*, *Jefferson County, Alabama* v. *Acker*, 527 U.S. 423, 432-33 (1999) ("[W]e credit the [defendants'] theory of the case for purposes of . . . our jurisdictional inquiry;" defendants need not have "an airtight case on the merits" to show the requisite nexus.); *Agyin* v. *Razman*, 986 F.3d 168, 175 (2d Cir. 2021) ("Not only must the words of § 1442 be construed broadly but a court also must 'credit [the d]efendants' theory of the case' when evaluating the relationship between the defendants' actions and the federal officer.").

Moreover, since Congress amended the statute in 2011, multiple courts of appeals, including the Third Circuit, have consistently held that the statute broadly applies to actions that are "*connected* or *associated*, with acts under color of federal office." *Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc); *see also Baker* v. *Atl. Richfield Co.*, 962 F.3d 937, 944 (7th Cir. 2020) ("Simply stated, the Companies did not need to allege 'that the complained-of conduct *itself* was at the behest of a federal agency.'"); *In re Commonwealth's*

Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila., 790 F.3d 457, 471 (3d Cir. 2015) ("[I]t is sufficient for there to be a 'connection' or 'association' between the act in question and the federal office."). And although the Second Circuit has not yet directly addressed the issue, it has taken a broad reading of the connection required for federal officer removal. *See Agyin*, 986 F.3d at 174 n.2. The claims in this case are connected to and associated with Defendants' substantial fossil fuel production at the direction of the federal government. *See* Dkt. 47 at 32-34. This is more than enough to support federal jurisdiction under the Federal Officer Removal statute, which the Court must construe "liberally" in favor of a federal forum. *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 147 (2007).

Third, the *Hoboken* court incorrectly held that the claims were not removable under the Outer Continental Shelf Lands Act because the defendants' alleged conduct was not a "but-for" cause of plaintiff's alleged injuries. *Hoboken* Order at 16-18. But the court failed to address clear precedent holding that there is federal jurisdiction, without requiring but-for causation, when "any dispute that alters the progress of production activities on the [Outer Continental Shelf ("OCS")] threatens to impair the total recovery of the federally-owned minerals from the OCS." *Amoco Prod. Co.* v. *Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988). And the Supreme Court's recent decision in *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), confirms that the "requirement of a 'connection' between a plaintiff's suit and a defendant's activities" does not necessarily require but-for causation. *Id.* at 1026 (declining to require "a strict causal relationship between the defendant's in-state activity and the litigation" for specific jurisdiction).

Dated: September 21, 2021 Respectfully submitted,

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