Nos. 21-15313, 21-15318

IN THE

United States Court of Appeals for the Ninth Circuit

CITY AND COUNTY OF HONOLULU,

Plaintiff-Appellee,

v.

SUNOCO LP, et al.,

Defendants-Appellants.

COUNTY OF MAUI,

Plaintiff-Appellee,

v.

CHEVRON USA INC., et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii,
Nos. 20-cv-00163, 20-cv-00470 (The Honorable Derrick K. Watson)

APPELLANTS' REPLY IN SUPPORT OF THEIR MOTION TO TAKE JUDICIAL NOTICE

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INTRODUCTION

Defendants have asked this Court to take judicial notice of three statements made on the record by Plaintiffs' counsel in *City & County of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. Cir. Ct.). Under Federal Rule of Evidence 201, a "court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Here, the fact that Plaintiffs made these statements "cannot reasonably be questioned" and is undisputed, so judicial notice is appropriate. *Id.*

First, during a hearing on August 27, 2021, Plaintiffs' counsel stated on the record that Plaintiffs' causal theory is based on "increased demand, which leads to increased production and sale, which leads to increased combustion, which leads to increased emissions, which leads to accelerated global climate change, which leads to injuries in Hawaii that affected the plaintiff." Hr'g Tr. at 107:11–15, *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. Cir. Ct. Aug. 27, 2021).

Second, during the same hearing, Plaintiffs' counsel stated unambiguously that Defendants' depiction of Plaintiffs' causal theory in "the graphic on page 5 of [Defendants'] reply brief is exactly correct." *Id.* at 123:4–5.

Third, on October 15, 2021, Plaintiffs' counsel stated on the record before the state court that it is Defendants' "products that give rise to claims of tortious conduct." Hearing Transcript, *City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (Haw. Cir. Ct. Oct. 15, 2021), at 35:13–14.

Plaintiffs concede that this Court may take judicial notice of "the existence of the transcripts and the fact that the hearings occurred in Hawaii state court," Resp. to Mot. at 7, but they argue that this Court may not "draw inferences" from their statements in those hearings, *id.* (internal quotation marks omitted), or conclude that Plaintiffs "made any concession that their claims center on greenhouse-gas emissions," *id.* at 5 (internal quotation marks omitted). Plaintiffs misapprehend the function of judicial notice.

Defendants are not asking this Court to take judicial notice of the truth of any disputed fact. Nor are they asking the Court to infer disputed facts from ambiguous statements. Rather, Defendants simply ask this Court to take judicial notice of the undisputed *fact* of Plaintiffs' counsel's statements on the record in the state litigation. That Plaintiffs' statements before another court happen to contravene Plaintiffs' arguments in this Court is not a reason for this Court to ignore them. And that these statements make clear that Plaintiffs' theory of causation and damages hinges on increased combustion of fossil fuels—resulting in increased emissions and, allegedly, climate change and its attendant effects on Plaintiffs' communities—is

hardly surprising: The Complaints themselves, as well as common sense and logic, establish that the production, sales, and emissions of greenhouse gases are central to Plaintiffs' theories of both liability and damages. *See, e.g.*, 2-ER-42 ("[F]ossil fuel production is . . . the delivery mechanism of [Plaintiffs'] injury.").

Thus, while Plaintiffs insist before this Court that their claims involve only allegations of "misrepresentation" and nothing more, at the same time they are relying in state court on their allegations about the production, marketing, sale, and third-party combustion of Defendants' fossil fuels as necessary links in the causal chain leading to their alleged injuries. Plaintiffs now ask this Court to turn a blind eye to those statements made in state court. But Defendants' request for judicial notice is uncontroversial and straightforward. Indeed, as this Court recognized earlier this year, courts "can take judicial notice of the fact that [one party] asserted . . . a theory," *United States v. Pangang Grp. Co.*, 6 F.4th 946, 959 (9th Cir. 2021), which is all Defendants seek here.

ARGUMENT

As Defendants noted in their Motion to Take Judicial Notice, "[t]he court may take judicial notice at any stage of the proceeding," including on appeal. Fed. R. Evid. 201(d). Indeed, this Court regularly takes notice of "the records of an inferior court in other cases." *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

Although courts may not take judicial notice of "sources whose accuracy can[] reasonably be questioned," Fed. R. Evid. 201(b)(2), they may "take judicial notice of the fact that [a party] made certain allegations in [a court document] because that can readily be verified," *Croyle v. Theatine Fathers, Inc.*, No. CV 19-00421 JAO-WRP, 2019 WL 7340501, at *5 (D. Haw. Dec. 30, 2019). Likewise, a court "can take judicial notice of the fact that [one party] asserted . . . a theory," *Pangang Grp.*, 6 F.4th at 959, even if it cannot assume the truth of that theory. *Accord GG Cap. v. Deutsche Bank AG*, No. 12-cv-02213-JLS, 2014 WL 1672567, at *3 n.3 (C.D. Cal. Apr. 28, 2014) (taking judicial notice of documents filed in different case "for the existence of the statements made therein, not for the truth of the matters asserted"), *aff'd*, 654 F. App'x 329 (9th Cir. 2016); *NuCal Foods, Inc. v. Quality Egg LLC*, 887 F. Supp. 2d 977, 984 (E.D. Cal. 2012) ("While the court cannot accept the veracity of the representations made in the documents, it may properly take judicial notice of the existence of those documents and of the representations having been made therein." (internal quotation marks omitted)); *Can v. Goodrich Pump & Engine Control Sys., Inc.*, 711 F. Supp. 2d 241, 250 n.12 (D. Conn. 2010) ("[T]he Court may judicially notice the transcript of the hearing in Indiana, not for the truth of any matters asserted therein, but rather for the fact that certain things were said, argued, and decided in that court.").

That is all Defendants ask: For this Court to take judicial notice of certain statements that Plaintiffs admit they made on the record in state court. Indeed, Plaintiffs concede, as they must, that this Court may "take judicial notice of the existence of the court transcripts" in question. Resp. to Mot. at 1. And they do not contest the accuracy of the transcripts. They argue, however, that this Court cannot "take the additional step of drawing inferences against [Plaintiffs] as to disputed issues based on the transcripts' contents." *Id.* Specifically, they argue that, because these transcripts are purportedly "amenable to multiple possible interpretations," they are "not a proper subject of judicial notice." *Id*. at 3. But Defendants are not asking this Court to accept the truth of Plaintiffs' statements. Nor are they asking the Court to infer any facts from ambiguous statements. Rather, given Plaintiffs' claim before this Court that their cases solely involve allegations of "deception," Defendants simply wish to point out that these same Plaintiffs have taken the contrary position in state court, relying on their allegations about the production, marketing, sale, and third-party combustion of Defendants' fossil fuels as necessary links in Plaintiffs' alleged causal chain.

Of course, Defendants need not (and do not) rely solely on these statements to demonstrate that Plaintiffs' claims encompass the production, sale, and combustion of fossil fuels, not just misrepresentations. Plaintiffs' Complaints tell that story

on their own. Plaintiffs' claims all rest on alleged physical injuries that, as the Complaints expressly plead, are caused by the worldwide "buildup of CO_2 in the atmosphere," 8-ER-1533, such that "[t]he mechanism" of those alleged harms is interstate and international "greenhouse gas emissions," 8-ER-1560. Plaintiffs allege that greenhouse gases are the "primary driver" of climate change, and that these greenhouse gases are created by "combusting fossil fuels to produce energy and using fossil fuels to create petrochemical products." 4-ER-519; 4-ER-542–53; 8-ER-1560; 8-ER-1584. Plaintiffs further allege that all of the harms that form the basis of their claims, including rising sea levels, erosion, and extreme weather, are caused by rising global temperatures that result from this fossil-fuel combustion, 4-ER-580; 8-ER-1630–31; indeed, "fossil fuel production is . . . the delivery mechanism of [Plaintiffs'] injury," 2-ER-42. And Plaintiffs demand damages for all injuries suffered as a result of global climate change. *See* 4-ER-612; 8-ER-1641–42. Under Plaintiffs' own theory of harm, their alleged injuries result from Defendants' production and supply of oil and gas.[1]

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[1] It is reflective and telling that Plaintiffs elected to sue oil and gas "producers" and describe them as such. *See* 8-ER-1531 ("Defendants are extractors, producers, refiners, manufacturers, distributors, promoters, marketers, and/or sellers of fossil fuel products . . . ."); 8-ER-1531–32 ("The rate at which Defendants have extracted and sold fossil fuel products has exploded since the Second World War . . . ."). Indeed, as to each series of Defendants, after the Complaints describe the

(Cont'd on next page)

Nevertheless, the contrast between Plaintiffs' statements in state and federal court is noteworthy. In state court, Plaintiffs include "increased production and sale," "increased combustion," and "increased emissions" as part of their "theory," Aug. 27 Hr'g Tr. at 107:8–17, but in the federal district court, 1-ER-3, and here, Resp. to Mot. at 2–3, Plaintiffs endeavor to have this Court ignore those allegations and focus solely on Defendants' alleged "deception" and misrepresentations.

Plaintiffs contend that their state-court statements are taken out of context, arguing that they merely wished to establish a "connection" between the products and their claims, not a causal link. *See* Resp. to Mot. at 7–9. To start, that argument is ironic because it amounts to Plaintiffs asking the Court to draw inferences from their statements, precisely what they argue elsewhere the Court should not do. In any event, Plaintiffs' statements speak for themselves. They demonstrate that Plaintiffs have conceded (as Plaintiffs must) that under the logic of their own theory, Defendants' fossil fuels are a necessary causal element in Plaintiffs' alleged injuries.

Defendants' corporate attributes, the very first allegation Plaintiffs make is that each one "controlled companywide decisions about the quantity and extent of fossil fuel production and sales." 8-ER-1545 (Chevron); 8-ER-1539 (same, ExxonMobil); 8-ER-1541 (same, Royal Dutch Shell); 8-ER-1547 (same, BHP); 8-ER-1549 (same, BP); 8-ER-1552 (same, Marathon Petroleum); 8-ER-1553 (same, ConocoPhillips); 8-ER-1536 (substantially same, Sunoco). *Accord* 4-ER-480–81; 4-ER-485; 4-ER-488; 4-ER-491–92; 4-ER-496; 4-ER-500; 4-ER-502–03; 4-ER-506; 4-ER-509.

And such "connections" to Defendants' actions taken under a federal officer's directions or to Defendants' operations on the Outer Continental Shelf ("OCS") are all that is necessary for removal. *See* Merits Reply Br. at 5–12, 24–30. Plaintiffs cannot defeat removal jurisdiction by arguing that their claims are merely "connected" to oil and gas extraction, production, and sales on the OCS or at the direction of a federal officer—that is precisely the relationship that allows removal of this case.

The authorities that Plaintiffs cite are inapposite. In *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988 (9th Cir. 2018), this Court held that a district court abused its discretion in taking judicial notice of a call transcript "reveal[ing] what investors already knew[]" about a certain business decision, *id.* at 1000 (internal quotation marks omitted). But the Court noted that the transcript was "not entirely consistent" and the language was subject to various interpretations. *Id.* Similarly, *Reina-Rodriguez v. United States*, 655 F.3d 1182 (9th Cir. 2011), involved a criminal defendant's challenge to his sentence, and the panel explained that the statements in question were "subject to varying interpretations," and noted, "most importantly," that "it is not within [the Court's] province to sentence the defendant based on considerations outside the sentencing decision," *id.* at 1193. Here, by contrast, Plaintiffs' counsel repeatedly asserted that "increased production and sale," "increased combustion," and "increased emissions" are *part* of Plaintiffs' causal theory. Aug.

27 Hr'g Tr. at 107:8–17. Those statements are not ambiguous or open to varying interpretations.

Likewise, *United States v. Raygoza-Garcia*, 902 F.3d 994 (9th Cir. 2018), is not relevant here, because it involved a motion to take judicial notice of "defense counsel's search of PACER and the Murrieta Border Patrol Station data" to draw the inference that government agents "have broadly misapplied the reasonable suspicion standard," *id.* at 1001. Defendants, however, are not asking this Court to infer any facts from the statements in question. Rather, they are simply asking the Court to take judicial notice of the undisputed fact that the Plaintiffs made these unambiguous representations to the Hawaii state court.

Finally, Plaintiffs' reliance on federal-court orders granting remand in other climate-change-related cases, *see* Resp. to Mot. at 10 n.5, misses the point and, in fact, exposes Plaintiffs' gambit: While in federal court, Plaintiffs have attempted to argue that their claims are limited to allegations of deception, but once they are back in state court, they argue that their Complaints include allegations of production, sale, and emissions from oil and gas. It is these allegations of production, sale, and emissions—which are clear from the face of the Complaints—that make removal appropriate.

Plaintiffs' attempt to characterize their claims as solely involving "misrepresentation" is nothing more than gamesmanship calculated to have this Court ignore

everything else that Plaintiffs allege and focus exclusively on an "earlier" moment in the causal chain leading to Plaintiffs' alleged injuries. *City of New York v. Chevron Corp.*, 993 F.3d 81, 97 (2d Cir. 2021). But, as the Second Circuit explained in addressing nearly identical claims, Plaintiffs cannot "whipsaw[] between disavowing any intent to address emissions" while "identifying such emissions as the singular source" of the alleged harm. *Id.* at 91. Plaintiffs should not be allowed to "have it both ways," *id.*, by conceding in state court the vital role that production, sales, and emissions play in their purported claims for relief, while disavowing in this Court any such role in an effort to avoid federal jurisdiction. As the Second Circuit put it, "[a]rtful pleading cannot transform [Plaintiffs'] complaint[s] into anything other than . . . suit[s] over global greenhouse gas emissions." *Id.* "It is precisely *because* fossil fuels emit greenhouse gases—which collectively exacerbate global warming—that [Plaintiffs are] seeking damages." *Id.*; *cf.* 4-ER-747 (alleging that "the sale and use of fossil fuel products . . . exacerbate global warming"); 8-ER-1628 (same). No matter how Plaintiffs' claims are characterized, and no matter how often Plaintiffs assert that their claims target "deception" alone, their requested relief necessarily seeks damages for physical harms resulting from global emissions.

CONCLUSION

The Court should grant Defendants' Motion to Take Judicial Notice.

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** Pursuant to Ninth Circuit L.R. 25-5(e), counsel attests that all other parties on whose behalf the filing is submitted concur in the filing's contents.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this reply in support of Appellants' motion complies with the applicable typeface, type-style, and type-volume limitations. This reply was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this reply contains 2,364 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

Dated: November 24, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 24, 2021

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