IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, Plaintiff, v. EXXON MOBIL CORP., *et al.*, Defendants.	Civil Action No. 1:20-cv-01932-TJK

DEFENDANTS' RESPONSE TO PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants write in response to the Attorney General's notice (Dkt. 91) regarding the district court's decision on the plaintiff's motion to remand in *Delaware v. BP America, Inc.* *See* Opinion ("*Delaware* Opinion" or "Op."), No. 20-1429-LPS, Dkt. 120 (D. Del. Jan. 5, 2022) (filed here at Dkt. 91-1). Defendants submit that the *Delaware* Opinion is incorrect, and the *Delaware* defendants have appealed that decision to the Third Circuit. The D.C. Circuit has never addressed the issues relevant to the pending motion to remand in this case, and the *Delaware* Opinion is not persuasive for many reasons including, but not limited to, the following.[1]

First, the *Delaware* court misunderstood the defendants' argument that the plaintiff's claims are governed by federal common law alone and therefore necessarily "arise under" federal law and are removable under 28 U.S.C. § 1331. The opinion assumed that the defendants' discussion of federal common law governing the plaintiff's claims ultimately boils down to "preemption arguments." Op. 7. But this interpretation of the defendants' federal-common-law argument is mistaken. An ordinary preemption defense would contend that a federal statute prevents the plaintiff from recovering under a viable state-law claim—that is, that state law could occupy the area. But the defendants never invoked that type of merits-stage preemption argument as a basis for jurisdiction. Rather, the defendants' removal argument concerns the antecedent choice-of-law question of which body of law exclusively governs the plaintiff's claims and

[1] The *Delaware* defendants have also filed a motion with the district court to stay its remand order pending appeal to the Third Circuit. The defendants argue that a stay pending appeal is appropriate for several reasons including, but not limited to, the fact that the Third Circuit (like the D.C. Circuit) has not yet considered the propriety of removing climate-change-related actions, like this one, on any of the grounds asserted by the defendants, but will now be able to consider all of those grounds in light of the Supreme Court's recent decision in *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1538 (2021). *See Delaware v. BP America, Inc.*, No. 20-1429-LPS, Dkt. 127 (D. Del. Jan. 14, 2022), at 1–2. For these and additional reasons, multiple district courts across the country have stayed remand orders in similar climate-change-related cases pending appellate review. *See id.* at 5–7.

requested relief. *See* Dkt. 51, at 11–12. Because the *Delaware* court incorrectly considered this issue as a preemption defense, it did not address whether the claims were necessarily governed by federal common law because where federal common law exists, state law (including preemptable state law) simply does not exist. If it had, the court should have concluded that federal common law necessarily governed the claims, just as the Second Circuit recently held that such claims "must be brought under federal common law"—and, thus, the nominally state-law claims are "federal claims." *City of New York v. Chevron Corp.*, 993 F.3d 81, 95 (2d Cir. 2021).

The *Delaware* court also erred in finding that the artful-pleading doctrine is limited to complete preemption. *See* Op. 9–10. Complete preemption is simply one application of the artful-pleading corollary, which arises whenever a plaintiff artfully pleads either to avoid or manufacture a federal claim. The *Delaware* court focused on a lack of Congressional intent, *see id.* at 9, but while Congressional intent may matter when considering whether the substantive applicability of a federal *statute* permits removal, it has no relevance when the plaintiff's claims arise under federal common law because our constitutional structure "does not permit the controversy to be resolved under state law," *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). The *Delaware* court thus did not consider that the rationale behind applying the artful-pleading doctrine in both the complete-preemption and federal-common-law contexts is the same: to prevent plaintiffs from camouflaging a claim that is "purely a creature of federal law" beneath state-law labels in an effort to rob defendants of their right to a federal forum. *Franchise Tax Bd. of the State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 23 (1983). There is "[n]o plausible reason" why "the appropriateness of and need for a federal forum should turn on whether the claim arose under a federal statute or under federal common law." Richard H. Fallon Jr., et al., *Hart & Wechsler's Federal Court and the Federal System* 819 (7th ed. 2015). Numerous other

courts have thus recognized federal common law as a basis for removal. *See, e.g.*, *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 853 F.3d 140, 147, 149 (4th Cir. 2017); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 928 (5th Cir. 1997).

Second, the *Delaware* Opinion rejected the defendants' *Grable* argument, but as numerous courts of appeals have held, where—as here—"federal common law *alone* governs" a claim, "'the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (4th Cir. 2002); *accord Newton v. Capital Assurance Co.*, 245 F.3d 1306, 1308–09 (11th Cir. 2001); *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 542–43 (5th Cir. 1997); *Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986). Indeed, it is difficult to imagine a situation in which a cause of action that arises under and is governed exclusively by federal common law would *not* raise a substantial federal question.

Third, the *Delaware* opinion dismisses the defendants' arguments for federal-officer removal based on their management of federal oil and gas reserves and their provision of specialized fuels to the military, reasoning that the *Delaware* plaintiff disclaimed any claims arising from the provision of fuels to the federal government. *See* Op. 17–18. But the Attorney General did not include such a disclaimer in its Complaint and therefore cannot avail itself of such an objection to federal jurisdiction. In any event, such artfully-pled disclaimers cannot defeat federal jurisdiction. *See, e.g.*, *O'Connell v. Foster Wheeler Energy Corp.*, 544 F. Supp. 2d 51, 54 n.6 (D. Mass. 2008) (rejecting attempt to disclaim "recovery for any injuries resulting from" acts "committed at the direction of an officer of the United States Government").

The *Delaware* court also held that defendants were not "acting under" federal officers in undertaking certain activities because they were subject to a "set of requirements" set by "federal statutes and regulations." Op. 22. But, as multiple courts of appeals have held, federal-officer

removal is warranted "where the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete." *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2012); *see also Buljic v. Tyson Foods, Inc.*, --- F.4th ---, 2021 WL 6143549, *5 (8th Cir., Dec. 30, 2021) (observing that the "acting under" prong is satisfied where "a private contractor provided the government with a product that it needed or performed a job that the government would otherwise have to perform"). The record evidence shows that is exactly what Defendants did here: they developed, produced, and supplied large quantities of highly specialized fuels that are required to conform to exact DOD specifications to meet the unique operational needs of the U.S. military. *See* Dkt. 51, at 35–40.

But the *Delaware* Opinion did notably recognize the strength of some of the same bases for federal-officer-removal that Defendants assert here. Specifically, the *Delaware* court described the "for, or relating to" prong as a "close call" because the defendants' operations on the Outer Continental Shelf "contribute[] to the broader theory about 'how the unrestrained production and use of Defendants' fossil fuel products contribute to greenhouse gas pollution.'" Op. 20–21; *see* Dkt. 51, at 40–43.

Fourth, the *Delaware* court incorrectly held that the plaintiff's claims were not removable under the Outer Continental Shelf Lands Act ("OCSLA") because the defendants' alleged conduct was not a "but-for" cause of the plaintiff's alleged injuries. *See* Op. 26–28. The court's but-for requirement improperly nullifies the statute's alternative prong establishing federal jurisdiction for claims "in connection with" OCSLA operations. 43 U.S.C. § 1349(b)(1). Moreover, the court overlooked the Supreme Court's recent decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), which confirmed 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).[2]

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

Dated: January 14, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 14, 2022, I caused the foregoing Response to Plaintiff's Notice of Supplemental Authority to be electronically filed using the Court's CM/ECF system, and service was effected electronically pursuant to Local Rule 49(d) to all counsel of record.

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