IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CITY OF CHARLESTON,

Plaintiff,

v.

BRABHAM OIL COMPANY, INC.; COLONIAL GROUP, INC.; ENMARK STATIONS, INC.; COLONIAL PIPELINE COMPANY; PIEDMONT PETROLEUM CORP.; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORPORATION; CHEVRON U.S.A. INC.; BP P.L.C.; BP AMERICA INC.; MARATHON PETROLEUM CORPORATION; MARATHON PETROLEUM COMPANY LP; SPEEDWAY LLC; MURPHY OIL CORPORATION; MURPHY OIL USA, INC.; HESS CORPORATION; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; AND PHILLIPS 66 COMPANY,

Defendants.

Civil Action No. 2:20-cv-03579-RMG

DEFENDANTS PIEDMONT PETROLEUM CORP. AND BRABHAM OIL COMPANY, INC.'S MOTION FOR LEAVE TO FILE SUR-REPLY IN OPPOSITION TO PLAINTIFF'S RENEWED MOTION TO REMAND

Piedmont Petroleum Corp. ("Piedmont") and Brabham Oil Company, Inc. ("Brabham"), through their undersigned counsel, move the Court for leave to file a Sur-Reply in opposition to the City's renewed Motion to Remand (ECF No. 139) and in reply to the City's argument in its Reply brief (ECF No. 142) that Piedmont and Brabham may be liable to the City under a failure to warn theory. A copy of Piedmont and Brabham's Sur-Reply is attached hereto as Exhibit A.

In its initial Motion to Remand, the City conceded that liability in this case is "cabined" to those who "coordinated, directed, or implemented" an alleged disinformation campaign relating to fossil fuels and climate change. The City made this concession in the context of arguing that

Piedmont and Brabham are not fraudulently joined, and, more specifically, in explaining why its theory of liability is not so broad as to render any company producing, selling, or advertising fossil fuel products liable to the City:

> Piedmont and Brabham's role in the deception campaigns also distinguishes them from other entities in the fossil fuel business. It is not true—as Defendants claim—that anyone who produces, sells, or advertises fossil fuel products could be sued under the City's theory of liability for "damages caused by climate change." NOR ¶ 202. *Instead, liability is cabined to those who coordinated, directed, or implemented the decades-long efforts to mislead consumers, regulators, and the public about the dangers of fossil fuel consumption.*

ECF No. 103 at 63 (emphasis added); *see also id.* at 62 ("If, as the Complaint asserts, Piedmont and Brabham helped to orchestrate and implement the disinformation campaigns, then a reasonable jury could hold these companies liable for the foreseeable harms flowing from those campaigns."); *id.* at 75 (arguing that the Court should not find that Piedmont and Brabham were fraudulently joined "[i]n light of the allegations plausibly tying Brabham and Piedmont to the disinformation campaign that exacerbated climate change and its local impacts in Charleston").

However, in its Supplemental Reply (ECF No. 142), the City argues that, even if Piedmont and Brabham did *not* participate in any alleged disinformation campaign, they nevertheless may be liable to the City based solely on their failure to warn the City about the dangers of fossil fuels and climate change. *See* ECF No. 142 at 15.[1] Oddly, the City does not attempt to reconcile its contention that Piedmont and Brabham may be liable under a failure to warn theory with its prior

[1] The City alleges that Piedmont and Brabham are liable for failure to warn under the City's strict liability, negligence, and South Carolina Unfair Trade Practices Act claims. *See generally* Compl. To the extent the City's claims against Piedmont and Brabham are based on their involvement in the alleged disinformation campaign, the City has no possibility of recovery for the reasons explained in Defendants' prior briefing. *See* ECF No. 141 at 32-34; ECF No. 112.

concession that liability is cabined to those participating in the alleged disinformation campaign, even though Piedmont and Brabham relied on the prior concession in their Response brief. *See* ECF No. 141 at 33.

Although the City argued in its initial Reply brief (ECF No. 116) that Piedmont and Brabham could be liable to the City under a failure to warn theory, the City did not make this argument in its Supplemental Opening Brief in Support of Its Motion to Remand and, instead, reiterated that its claims were based on defendants' participation in the alleged disinformation campaign. *See, e.g.*, ECF No. 139 at 25 ("Most of the conduct [defendants] cite . . . are [sic] irrelevant for purposes of removal because Defendants' alleged disinformation campaign, *which is what the instant case is actually about*, started 'decades later.'") (emphasis added); *id.* at 19 ("Defendants do not contend here that the government had any involvement in the alleged deceptive marketing and disinformation that underpin the City's claims."); *id.* at 6 ("Defendants cannot rely on federal enclave jurisdiction, both because the City disclaims injuries on federal land and because Defendants' disinformation campaign did not take place on any such land.").

The City will not be prejudiced if the Court considers the arguments in Piedmont and Brabham's Sur-Reply. These arguments respond only to the City's argument—made in its Reply briefs but not in its initial Motion to Remand or its Renewed Motion to Remand—that Piedmont and Brabham may be liable under a failure to warn theory.

For the foregoing reasons, and to allow the Court to fully consider the issues before it, Piedmont and Brabham move this Court for leave to file the Sur-Reply attached hereto as Exhibit A. *See Genesis Health Care, Inc. v. Soura*, 165 F. Supp. 3d 443, 456 (D.S.C. 2015) (granting plaintiff's motion for leave to file sur-reply "[i]n the interest of full consideration of the issues" and in light of defendant's decision to wait to raise an argument in a second brief opposing

plaintiff's motion for summary judgment).

Pursuant to Local Civil Rule 7.02, Piedmont and Brabham's counsel affirm that, prior to filing this motion, they attempted to confer with the City's counsel regarding the relief requested in this motion. Piedmont and Brabham's counsel provided a copy of Piedmont and Brabham's Sur-Reply to all counsel of record for the City on December 27, 2022, and requested that the City's counsel confirm whether the City consented to the filing of the Sur-Reply by December 29, 2022. The undersigned also called the City's counsel on the morning of December 30, 2022, in an attempt to confer. To date, Piedmont and Brabham's counsel have not received a response from the City's counsel.

Respectfully submitted,

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December 30, 2022
Charleston, South Carolina

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CITY OF CHARLESTON, Plaintiff, v. BRABHAM OIL COMPANY, INC.; COLONIAL GROUP, INC.; ENMARK STATIONS, INC.; COLONIAL PIPELINE COMPANY; PIEDMONT PETROLEUM CORP.; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORPORATION; CHEVRON U.S.A. INC.; BP P.L.C.; BP AMERICA INC.; MARATHON PETROLEUM CORPORATION; MARATHON PETROLEUM COMPANY LP; SPEEDWAY LLC; MURPHY OIL CORPORATION; MURPHY OIL USA, INC.; HESS CORPORATION; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; AND PHILLIPS 66 COMPANY, Defendants.	Civil Action No. 2:20-cv-03579-RMG **DEFENDANTS PIEDMONT PETROLEUM CORP. AND BRABHAM OIL COMPANY, INC.'S SUR-REPLY IN OPPOSITION TO PLAINTIFF'S RENEWED MOTION TO REMAND**

I. Introduction

In its initial Motion to Remand, the City conceded that liability in this case is "cabined" to those who "coordinated, directed, or implemented" an alleged disinformation campaign relating to fossil fuels and climate change. The City made this concession in the context of explaining why its theory of liability is not so broad as to render any company producing, selling, or advertising fossil fuel products liable to the City:

> Piedmont and Brabham's role in the deception campaigns also distinguishes them from other entities in the fossil fuel business. It is not true—as Defendants claim—that anyone who produces, sells,

> or advertises fossil fuel products could be sued under the City's theory of liability for "damages caused by climate change." NOR ¶ 202. *Instead, liability is cabined to those who coordinated, directed, or implemented the decades-long efforts to mislead consumers, regulators, and the public about the dangers of fossil fuel consumption.*

ECF No. 103 at 63 (emphasis added); *see also id.* at 62 ("If, as the Complaint asserts, Piedmont and Brabham helped to orchestrate and implement the disinformation campaigns, then a reasonable jury could hold these companies liable for the foreseeable harms flowing from those campaigns."); *id.* at 75 (arguing that the Court should not find that Piedmont and Brabham were fraudulently joined "[i]n light of the allegations plausibly tying Brabham and Piedmont to the disinformation campaign that exacerbated climate change and its local impacts in Charleston.").

However, in its Supplemental Reply (ECF No. 142), the City argues that, even if Piedmont and Brabham did *not* participate in any alleged disinformation campaign, they nevertheless may be liable to the City based solely on their failure to warn the City about the dangers of fossil fuels and climate change. *See* ECF No. 142 at 15.[1] Oddly, the City does not attempt to reconcile its contention that Piedmont and Brabham may be liable under a failure to warn theory with its prior concession that liability is cabined to those participating in the alleged disinformation campaign, even though Piedmont and Brabham relied on the prior concession in their Response brief. *See* ECF No. 141 at 33.[2]

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[1] The City alleges that Piedmont and Brabham are liable for failure to warn under the City's strict liability, negligence, and South Carolina Unfair Trade Practices Act claims. *See generally* Compl. To the extent the City's claims against Piedmont and Brabham are based on their involvement in the alleged disinformation campaign, the City has no possibility of recovery for the reasons explained in Defendants' prior briefing. *See* ECF No. 141 at 32-34; ECF No. 112.

[2] Although the City argued in its initial Reply brief (ECF No. 116) that Piedmont and Brabham could be liable to the City under a failure to warn theory, the City did not make this argument in its Supplemental Opening Brief in Support of Its Motion to Remand and, instead, reiterated that its claims were based on defendants' participation in the alleged disinformation campaign. *See,*

Piedmont and Brabham submit this Sur-Reply to respond to the City's contention that they may be liable to the City under a failure to warn theory and therefore are not fraudulently joined. On the merits, for each of the following reasons, the City has no possibility of recovering from Piedmont or Brabham on a failure to warn theory. Because the City cannot prove liability based on a failure to warn theory and has not and cannot show Piedmont or Brabham engaged in any disinformation campaign, the Court should deny the City's Renewed Motion to Remand as Piedmont and Brabham were fraudulently joined as in-state defendants in this case.

II. Argument

A. The City has no possibility of recovery on its failure to warn claims against Piedmont and Brabham because the City is not a "user" or "consumer" of the fossil fuel products sold by Piedmont and Brabham.

In South Carolina, a manufacturer or seller's duty to warn of an unreasonably dangerous product extends only to the "user" or "consumer" of the product. This is true whether the claim is brought under a theory of strict liability or negligence. *See* S.C. Code Ann. § 15-73-10 ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused *to the ultimate user or consumer*, or to his property . . . .") (emphasis added); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 543, 462 S.E.2d 321, 328 (1995) ("[U]nder any products liability theory, the plaintiff must show: . . . the injury occurred because the product was in a defective condition, unreasonably dangerous *to the user*[.]") (emphasis added); *Livingston v. Noland Corp.*, 293 S.C. 521, 525, 362 S.E.2d 16, 18 (1987)

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e.g., ECF No. 139 at 25 ("Most of the conduct [defendants] cite . . . are [sic] irrelevant for purposes of removal because Defendants' alleged disinformation campaign, *which is what the instant case is actually about*, started 'decades later.'") (emphasis added); *id.* at 19 ("Defendants do not contend here that the government had any involvement in the alleged deceptive marketing and disinformation that underpin the City's claims."); *id.* at 6 ("Defendants cannot rely on federal enclave jurisdiction, both because the City disclaims injuries on federal land and because Defendants' disinformation campaign did not take place on any such land.").

(discussing negligent failure to warn claims: "A supplier and manufacturer of a product are liable for failing to warn if they know or have reason to know the product is or is likely to be dangerous for its intended use; they have no reason to believe *the user* will realize the potential danger; and, they fail to exercise reasonable care to inform of its dangerous condition or of the facts which make it likely to be dangerous.") (emphasis added).

In determining whether a plaintiff is a "user" or "consumer," South Carolina courts look to Section 402A of the Restatement (Second) of Torts. *See Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 221, 781 S.E.2d 548, 554 (2015). Although the definition of "user" or "consumer" is not limited to the actual purchasers or ultimate users of a product, *see Lawing*, 415 S.C. at 224, 781 S.E.2d at 556 (citing Restatement (Second) of Torts § 402A cmt. l), a consumer or user of a defective product "is not a mere bystander but a primary and direct victim of the product defect," *Lawing*, 415 S.C. at 222, 781 S.E.2d at 555 (quoting *Bray v. Marathon Corp.*, 356 S.C. 111, 117, 588 S.E.2d 93, 95 (2003)).

Here, the City is at most a mere bystander of Piedmont and Brabham's sales of fossil fuels. Indeed, the City is no more "a primary and direct victim" of the allegedly defective nature of the products sold by Piedmont and Brabham than any other city or person in the world. This is true for several reasons. First, it is undisputed that Piedmont and Brabham do not own or operate—and have never owned or operated—a gas station in the City of Charleston. *See* ECF Nos. 112-1, 112-2. Moreover, the City does not allege that it has ever purchased any fossil fuel products from Piedmont or Brabham, nor does the City otherwise allege that it is a "user" or "consumer" of Piedmont or Brabham's products. *See generally* Compl. Instead, the City alleges only that Piedmont and Brabham market and sell their products to consumers *in South Carolina*. *See* Compl. ¶ 22(d) (alleging that Piedmont markets, promotes and advertises its fossil fuel products "to

consumers in South Carolina"); *id.* ¶ 20(f) (alleging that Brabham's fossil fuel products have been "consumed in South Carolina").

Notably, the City does not allege that the harm it suffered from the defendants' sale of fossil fuels is any different than the harm allegedly suffered by the remainder of "Earth's inhabitants." *See* Compl. ¶ 95 (alleging that the "Defendants faced the decision of whether or not to take steps to limit the damages their fossil fuel products were causing and would continue to cause *Earth's inhabitants, including the people of Charleston*") (emphasis added); *see also id.* ¶ 169 (alleging that "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere attributable to anthropogenic sources because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gasses quickly diffuse and comingle in the atmosphere"). Thus, if the City was treated as "a primary and direct victim" of Piedmont's and Brabham's fossil fuel products, so would every other person and city on planet Earth.

A recent case decided by this Court is instructive. *See Comm'rs of Pub. Works of City of Charleston v. Costco Wholesale Corp.*, No. 2:21-CV-42-RMG, 2021 WL 5908758. (D.S.C. Dec. 13, 2021). In *Costco*, the Charleston Water System sued retailers for selling "flushable" wipes that allegedly caused damage to its sewer system. The Court held that the plaintiff was a "primary and direct victim" of the flushable wipes—and therefore was a user or consumer—because the defendants sold the wipes in the Charleston area and "affirmatively market[ed] to consumers that their flushable wipes are designed, and indeed *should be* disposed of *via* Plaintiff." *Id.* at *5 (emphasis in original). Significantly, in analyzing this issue, this Court cited with approval *City of Spokane v. Monsanto Co.*, No. 2:15-cv-201-SMJ, 2016 WL 6275164, at *2, 6 (E.D. Wa. Oct. 26,

2016), as an example of a case where the plaintiff was *not* a user or consumer for purposes of a products liability claim. *Id.*

In that case, the city of Spokane sued Monsanto for damages allegedly caused by polychlorinated biphenyls (PCBs), synthetic chemical compounds that were manufactured, marketed, and sold by Monsanto for many years. The city of Spokane alleged that PCBs "leached or migrated from their original places of use and intended application into the environment in and around Spokane." *Id.* at *1. The Eastern District Court of Washington granted Monsanto's motion to dismiss the city of Spokane's failure to warn claim because the city of Spokane was not a user or consumer of the PCBs that caused the alleged harm:

> The Court need not decide the precise contours of the line between a Plaintiff who may bring a products-liability claim as a non-user or consumer and one who may not because, wherever that line is located, Spokane is well beyond it. Spokane was not a bystander in close proximity to and directly injured by another's use of a defective product . . . . Spokane is alleging injury based on the accumulated contamination resulting from leaching or migration of PCBs into its wastewater systems as the result of the use and disposal of an allegedly defective product over many years by multitudes of consumers.

Id. at *6. The Western District of Washington reached the same conclusion when addressing similar claims in *City of Seattle v. Monsanto Co.*, 237 F. Supp. 3d 1096 (W.D. Wash. 2017). *Id.* at 1108 ("Seattle does not allege that it 'used' or 'consumed' Monsanto's toxic products, and the Court is not persuaded by Seattle's argument that, as a municipality, it is as foreseeable a 'bystander' as a member of a consumer's household.").

The reasoning applied in *Spokane* and *Seattle* applies with even greater force to the City's claims in this case. The City alleges an injury based on the accumulation of greenhouse gas emissions, which were the result of the use of fossil fuel products over many years by multitudes of consumers all over the world. *See, e.g.*, Compl. ¶ 9 (alleging that "[t]he substantial majority of

all greenhouse gas emissions in history have occurred since the 1950s"); *id.* ¶ 47 ("As greenhouse gases accumulate in the atmosphere, the Earth radiates less energy back to space. This accumulation and associated disruption of the Earth's energy balance have myriad environmental and physical consequence . . . ."). Unlike in *Costco*, Piedmont and Brabham did not sell fossil fuel products in the Charleston area, nor did they direct their customers to use the fossil fuels in a way that would render the City a "primary and direct victim" of the harms allegedly caused by those fossil fuels. Again, the City does not allege that it is any more a victim of the fossil fuel products sold by Piedmont and Brabham than the remainder of "Earth's inhabitants." Because the City's alleged injury in this case cannot be distinguished from the injury suffered by any other person or city on Earth, the City is not "a primary and direct victim" of the alleged defect and therefore has no possibility of recovering from Piedmont or Brabham on a failure to warn theory.

B. The City has no possibility of recovery on its negligent failure to warn claim because there is no general duty to warn third parties of potential danger, and no exception applies.

The City's negligent failure to warn claim fails for the additional reason that Piedmont and Brabham did not owe the City any duty to warn of potential dangers. A negligent failure to warn claim, in the products liability context, is rooted in the common law. *See Gasque v. Heublein, Inc.*, 281 S.C. 278, 282, 315 S.E.2d 556, 558 (S.C. Ct. App. 1984) (recognizing that products liability claims brought under a theory of negligence originated in common law). Under South Carolina common law, "there is no general duty to control the conduct of another or to warn a third person or potential victim of danger." *Faile v. S.C. Dep't of Juv. Just.*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002); *see also Martin v. Highland Indus., Inc.*, 485 F. Supp. 3d 649, 662 (D.S.C. 2020). The only exceptions to this rule are:

> 1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3)

> where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant.

Martin, 485 F. Supp. 3d at 662.

The City has not alleged that any of these exceptions applies to Piedmont or Brabham. Nor could it. Piedmont and Brabham have no special relationship to either the City or the injurer, nor have they voluntarily undertaken any duty to warn the City of the dangers of fossil fuels and climate change. The City has not alleged and has no possibility of proving that the family-owned businesses of Piedmont and Brabham "create[d] the risk" of climate change. Finally, no statute imposes a duty on Piedmont or Brabham to warn the City of the dangers of fossil fuels or climate change.

C. The City has no possibility of recovery on its failure to warn claims because Piedmont and Brabham's fossil fuel products cannot be considered "unreasonably dangerous" under South Carolina law.

A manufacturer or seller's duty to warn extends only to products which are "unreasonably dangerous to the user." *Bragg*, 319 S.C. at 539, 462 S.E.2d at 326. However, the type of danger alleged by the City—a general danger created by the aggregate use of a product by many users over many years—is simply not the type of danger that gives rise to a cause of action for a failure to warn under South Carolina law.

As set forth above, South Carolina adopted § 402A of the Restatement (Second) of Torts and incorporated the comments to § 402A by statute. *See* S.C. Code Ann. § 15-73-30; *see also Livingston*, 293 S.C. at 525, 362 S.E.2d at 18 (citing S.C. Code Ann. § 15-73-30 and § 402A of the Restatement (Second) of Torts, while discussing negligent failure to warn claims). The United States Court of Appeals for the Seventh Circuit, applying § 402A under Illinois law, addressed similar claims in *City of Chicago v. General Motors Corp.*, 467 F.2d 1262 (7th Cir. 1972), where the plaintiff sued automobile manufacturers alleging that their products were unreasonably

dangerous because they caused pollution. The Seventh Circuit noted that "[t]he test of what is 'unreasonably dangerous' must be applied to each product (in [that] case to each automobile) and not to the gross effect of an indefinite conglomerate of products manufactured by several manufacturers," *id.* at 1267, and held that the plaintiff's allegation "that an indeterminate number of persons are generally harmed by an atmosphere polluted and contaminated by an indeterminate number of sources does not state a cause of action . . . nor a claim upon which relief can be granted," *Id.* at 1268.

The City's claims in this case are analogous to the claims dismissed in *City of Chicago*. The City has alleged that Defendants' fossil fuel products are dangerous because they contributed to global warming and climate change. This is unmistakably a "general harm" suffered by an "indeterminate number of persons," resulting from the "gross effect" of many products manufactured and sold by many entities and used by the public at large. Such harms do not render a product "unreasonably dangerous" within the meaning of § 402A and do not support a failure to warn claim under South Carolina law.

III. Conclusion

Neither Piedmont nor Brabham were named as defendants in the two dozen nearly identical lawsuits filed in other jurisdictions by the City's outside counsel. The decision to name Piedmont and Brabham here, even though Piedmont and Brabham are family-owned businesses that have never had a gas station in the City of Charleston, is a transparent attempt to defeat diversity jurisdiction and is the reason the doctrine of fraudulent joinder exists.

For the foregoing reasons, and for those set forth in Piedmont's and Brabham's prior briefing (ECF No. 141 at 32-34; ECF No. 112), the Court should find that the City fraudulently joined Piedmont and Brabham to this lawsuit and deny Plaintiff's Renewed Motion to Remand.

Respectfully submitted,

/s/
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