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

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.

C/A No. 2:20-cv-03579-RMG

PLAINTIFF'S OPPOSITION TO DEFENDANTS PIEDMONT PETROLEUM CORP.'S AND BRABHAM OIL COMPANY, INC.'S MOTION FOR LEAVE TO FILE SURREPLY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

I. INTRODUCTION

Defendants Brabham Oil Company, Inc., and Piedmont Petroleum Corp. ("South Carolina Defendants") claim that more than two years after removing this case on fraudulent joinder grounds, twenty months after briefing closed on Plaintiff City of Charleston's ("City" or "Charleston") initial motion to remand, and five weeks after briefing closed on Charleston's renewed motion, they have just discovered a supposed critical inconsistency in Charleston's second reply brief, and now seek leave to file a surreply. In reality, however, the City's arguments and theories of liability have remained consistent since the case's inception. The City's *fourth brief* in support of remand did not introduce any new arguments to which the South Carolina Defendants lacked an earlier opportunity to respond. The South Carolina Defendants "simply squandered [their] chance" to address Charleston's failure to warn and consumer protection claims through multiple rounds of briefing across multiple years, "and cannot now claim prejudice." *See EEOC v. Freeman*, 961 F. Supp. 2d 783, 801 (D. Md. 2013), *aff'd in part*, 778 F.3d 463 (4th Cir. 2015). This is an archetypal instance where leave to file a surreply should be denied.

The parties have spilled more than enough ink concerning Defendants' improper removal of this case from state court, and the Court has already received seven briefs on the subject. *See* Docs. 103, 111, 112, 116, 139, 141, 142. The South Carolina Defendants' untimely and meritless motion for leave should be denied so the Court can rule on the City's motion to remand, which has remained pending for more than two years. The South Carolina Defendants may present their arguments in state court, where this case belongs.

II. LEGAL STANDARD

Under the district's local rules, "[r]eplies to responses are discouraged," and "a party desiring to reply to matters raised initially in a response to a motion or in accompanying supporting

documents shall file the reply within seven (7) days after service of the response, unless otherwise ordered by the court." Local Civ. Rule 7.07 (D.S.C.). The local rules "make no provision for sur-replies, and courts in this circuit generally only allow sur-replies when fairness dictates that a party be provided the opportunity to address an issue that was raised for the first time in a responsive briefing." *Koppers Performance Chemicals, Inc. v. Travelers Indem. Co.*, No. 2:20-CV-2017-RMG, 2021 WL 5906112, at *3 (D.S.C. Nov. 5, 2021) (Gergel, J.); *see Khoury v. Meserve*, 268 F. Supp. 2d 600, 605 (D. Md. 2003), *aff'd*, 85 F. App'x 960 (4th Cir. 2004) (Surreplies "may be permitted when the moving party would be unable to contest matters presented to the court for the first time in the opposing party's reply.").

A surreply is not warranted where the reply brief "did not raise a new legal theory or new evidence, but instead responded to [the opposing party's] own argument and evidence." *FDIC v. Cashion*, 720 F.3d 169, 176 (4th Cir. 2013). A surreply is likewise inappropriate where the party seeking leave "failed to anticipate how the [opposing party] would respond" to its arguments. *Id.*

III. ARGUMENT

The South Carolina Defendants have not shown any justification to file a surreply, so their motion should be denied. First, the City's supposed "concession," on which the South Carolina Defendants purport to have "relied," *see* Mot. for Leave at 2–3, is illusory. The City's jurisdictional arguments and theories of liability have remained consistent since the Complaint was filed. The South Carolina Defendants' argument relies exclusively on cherry-picked sentences pulled out of context from the City's first opening brief in support of remand, and ignores both the allegations in the complaint and the vast majority of the parties' briefing. The South Carolina Defendants' central contention—that they had no notice until the City filed its second reply brief in November 2022

that the City's theory of liability encompasses Defendants' silence about the internally-known climatic risks of burning fossil fuels —is not credible.

Second, South Carolina Defendants' motion for leave is untimely, both as a general matter of reasonableness and in light of the proceedings to date. The parties have briefed the City's motion for remand twice, both times under stipulated briefing schedules approved by the Court. The South Carolina Defendants offer no explanation why they first indicated their intent to file a surreply five weeks after the second round of briefing closed. That delay alone is sufficient reason to deny leave.

1. The City's Reply is Entirely Consistent With the City's Three Previous Briefs, and With the City's Complaint.

The South Carolina Defendants' motion is baseless because their claimed surprise is simply implausible. The crux of their motion is that in the City's first motion to remand, filed February 26, 2021, the City "conceded" that "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." Mot. for Leave at 2 (quoting Doc. 103 at 63). The South Carolina Defendants say they "relied" on that "concession," and claim they did not learn of the City's "contention that Piedmont and Brabham may be liable under a failure to warn theory" or under the South Carolina Unfair Trade Practices Act ("UTPA") until the City filed its second reply brief on November 22, 2022. Mot. for Leave at 2. They make that assertion even though they admit "the City argued in its initial Reply brief (ECF No. 116)" in May 2021 "that Piedmont and Brabham could be liable to the City under a failure to warn theory." Mot. for Leave at 3. They ignore entirely the allegations and causes of action pleaded in the City's complaint, and the overall thrust of the parties' briefing, which clearly incorporate failure to warn and UTPA theories against all defendants. Under any reasonable view of the record, the City has consistently asserted that the South Carolina Defendants are subject to the complaint's failure to warn and UTPA claims.

Contrary to the South Carolina Defendants' contentions, the City clearly indicated throughout its complaint that "Piedmont and Brabham may be liable under a failure to warn theory" and under the UTPA for concealing the internally-known climatic risks of burning fossil fuels. *See* Mot. for Leave at 2. The very first paragraph alleges that all Defendants "have known for nearly half a century that unrestricted production and use of fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate," and "engaged in a coordinated, multi-front effort to *conceal* and deny their own knowledge of those threats." *See* Complaint ¶ 1, Doc. 1-2 at 6 (Oct. 9, 2020) ("Compl.") (emphasis added). The complaint further alleges that "[i]nstead of warning of those known consequences following from the intended and foreseeable use of their products . . . , Defendants concealed the dangers." Compl. ¶ 8.[1] It expressly alleges as to Brabham Oil Co. that "Brabham's statements in and outside of South Carolina . . . *and its chronic failure to warn consumers of global warming-related hazards*" were intended to mislead the public and injured the City. Compl. ¶ 20(e) (emphasis added).

The complaint's third, fourth, and sixth causes of action—for Strict Liability Failure to Warn, Negligent Failure to Warn, and violations of the UTPA respectively—are all captioned "Against All Defendants." *See* Compl. at 127, 129, 133. Those causes of action expressly allege that "Defendants, *and each of them*, at all times had a duty to issue adequate warnings" concerning the "reasonably foreseeable and knowable severe risks posed by their fossil fuel products," but failed to provide adequate warnings to consumers or any other party. *See* Compl. ¶¶ 173, 177, 186, 189, 207, 209 (emphasis added). From the start, South Carolina Defendants have had clear notice

[1] *See also, e.g.*, Compl. ¶ 12 ("Defendants' individual and collective conduct, including, but not limited to, their introduction of fossil fuel products into the stream of commerce knowing but *failing to warn* of the threats posed to the world's climate, . . . actually and proximately caused the City's injuries.") (emphasis added).

that the City is pursuing failure to warn and UTPA causes of action based on their public silence about the climatic risks of burning fossil fuels.

The City's remand briefing has been consistent with the complaint's allegations, and does not implicitly abandon any cause of action against any defendant. The City's first motion to remand, for example, states that "the relevant activity here 'is the *concealment* and misrepresentation of [fossil fuel] products' known dangers.'" *See* Doc. 103 at 27 (quoting *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 467 (4th Cir. 2020)) (emphasis added). In turn, "the City's claims are based on Defendants' *failure to warn consumers and the public* of known dangers associated with fossil fuel products," in addition to their active deception efforts. *Id.* at 29.[2] The supposed "concession" on which the South Carolina Defendants rely, read in context, argues that the Defendants' notice of removal "misconstrue[s] the City's theory of causation when [it] focus[es] exclusively on Brabham and Piedmont's individual 'production or sales' of fossil fuels," because the City's theory of liability in fact rests on the Defendants' misrepresentations *and failure to warn*. *Id.* at 62. This argument rebuts the contention in Defendants' notice of removal that "anyone who produces, sells, or advertises fossil fuel products could be sued under the City's theory of liability," on a *de facto* strict liability standard. *Id.* at 63. The brief does not abandon any cause of action alleged in the complaint.

[2] *See also, e.g.*, Doc. 103 at 12 ("There is no basis to presume that Congress intended to subsume state-law claims for *failure to warn*, trespass, nuisance, and *deceptive trade practices* into bodies of judge-made federal law . . . .") (emphasis added); *id.* at 45 ("Defendants must identify actions taken under a federal officer that relate to the charged conduct, namely: the concealment and misrepresentation of the products' known dangers, and simultaneous promotion of their unrestrained use.") (cleaned up); *id.* at 52 ("Here, the pertinent events—the misrepresentations *and omissions* Defendants made in connection with the sale of fossil fuel goods—overwhelmingly occurred outside of any discrete federal enclaves.") (emphasis added).

As the South Carolina Defendants admit, the City's first reply argued in relevant part that the briefing filed in opposition to remand "does not even discuss or attempt to rebut the City's failure to warn and Unfair Trade Practices Act claims." Doc. 116 at 40. That omission was fatal to Defendants' fraudulent joinder argument because, as the City explained in its initial opening brief, "where a plaintiff shows a 'glimmer of hope' of supporting *any* claim in the complaint," there is no fraudulent joinder and remand should be granted. *See Burch v. Olympus Am., Inc.*, No. 3:18-CV-285-RJC-DCK, 2019 WL 1234352, at *3 (W.D.N.C. Feb. 19, 2019) (emphasis added) (citing *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424, 426 (4th Cir. 1999)); *see* Doc. 103 at 58–59. Because the opposition brief did not even attempt to argue that the City's failure to warn or UTPA claims are meritless, fraudulent joinder could be rejected on that basis alone. The South Carolina Defendants have been aware of the City's position as to those claims since May 2021 at the latest, but did not seek to file a surreply to respond until late December 2022.

The Defendants' Supplemental Answering Brief in Opposition to the City's Renewed Motion to Remand *still* did not discuss or attempt to rebut the City's failure to warn and UTPA claims. The one-page section addressing fraudulent joinder in that brief argued that the South Carolina Defendants "played no role in any marketing campaign relating to greenhouse gases, global warming, or the science of climate change," and "adopt[ed] and incorporated by reference" the "separate brief filed previously by Brabham and Piedmont," which also ignored the failure to warn and UTPA claims. *See* Doc. 141 at 33. The City replied, for the second time, that the South Carolina Defendants had "not rebut[ted] the City's claims for failure to warn and violation of the South Carolina Unfair Trade Practices Act," and thus could not prove fraudulent joinder. Doc. 142 at 15. The South Carolina Defendants' claim that they had no prior warning "Piedmont and Brabham may be liable under a failure to warn theory" is flatly false. *See* Mot. for Leave at 2.

In sum, the City's supplemental reply "did not raise a new legal theory or new evidence, but instead responded to [the South Carolina Defendants'] own argument and evidence," by once again pointing out their failure to address the City's failure to warn and UTPA claims in either of Defendants' two joint opposition briefs or the supplemental opposition filed only on behalf of the South Carolina Defendants. *FDIC v. Cashion*, 720 F.3d at 176. The South Carolina Defendants "did not lack a chance to respond"; they "simply squandered [their] chance, and cannot now claim prejudice." *EEOC v. Freeman*, 961 F. Supp. at 801. Their "fail[ure] to anticipate how the [City] would respond" to their supplemental opposition brief—namely using the same arguments the City raised in reply to the first opposition brief—is not a basis for another bite at the apple, and the motion for leave should be denied. *FDIC v. Cashion*, 720 F.3d at 176.

2. The Motion for Leave is Facially and Unnecessarily Untimely.

Even if the South Carolina Defendants' motion for leave had any merit, the Court can deny leave solely on the basis that the motion is untimely. The South Carolina Defendants first indicated their intent to file a surreply thirty-five days after the parties' second stipulated briefing schedule closed. Their motion is inconsistent with the detailed briefing schedule the parties negotiated and the Court approved, and they offer no explanation for their delay.

The briefing schedule on the City's renewed motion, which has been in place since September 6, 2022, neither explicitly nor implicitly permits surreplies. To recite the relevant history, the Court ordered the parties on July 6 to file a joint status report in light of the Fourth Circuit's decision in *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022), which the parties filed on July 11. *See* Docs. 128, 133. On August 22, the Court lifted the then-pending stay of proceedings and ordered the parties "to submit renewed briefing on Plaintiffs' motion to remand in accordance to an agreed schedule." Doc. 134. The parties submitted a

stipulated schedule, which the Court approved on September 6. *See* Docs. 137, 138. The stipulated schedule included page limits for each brief, and closed on November 22, 2022. *See* Doc. 137 at 2. The parties agreed that if the Court denies the Renewed Motion to Remand, "Defendants will file any Motions to Dismiss within 60 days" of that order. *Id.* at 3, ¶ 5. Among other provisions, Defendants "reserve[d] the right to seek an extension of time to respond to the Complaint and the Parties reserve[d] the right to request that the Court stay proceedings." *Id.* at 3, ¶ 7. The stipulation did not contemplate surreplies. On December 27, five weeks after the briefing closed, the South Carolina Defendants nonetheless asked the City's consent to file a surreply. *See* Doc. 143 at 4. They filed the motion for leave on December 30, 2022. *See id.*

Courts routinely decline to allow surreplies in similar circumstances. In *Cashion*, a defendant argued in relevant part on appeal that "the district court abused its discretion in striking his surreply brief opposing summary judgment and an affidavit attached to it." 720 F.3d at 171. The plaintiff argued that "nothing in the court's Pretrial Order and Case Management Plan authorized the filing of a surreply," and that a surreply was not warranted in any event. *Id*. at 173 (cleaned up). The Fourth Circuit held the district court did not abuse its discretion by striking the surreply, noting that "[s]urreplies are generally not permitted under the local rules of the Western District of North Carolina," and reiterating that "the parties' briefing schedule did not authorize filing one." *Id.* at 176. Exactly the same is true here: the District of South Carolina rules "make no provision for sur-replies," *Koppers Performance Chemicals*, 2021 WL 5906112, at *3, and nor does the parties' detailed stipulated briefing schedule. The South Carolina Defendants' motion is straightforwardly inappropriate under the parties' agreements and court rules.

The South Carolina Defendants' unexplained thirty-five-day delay in seeking leave likewise demonstrates that a surreply is neither necessary nor appropriate. In *Douse v. Colonial Life &*

Accident Ins. Co., No. CV 3:08-1671-CMC, 2009 WL 10678302, at *6 (D.S.C. Feb. 3, 2009), the court held that the plaintiff's motion for leave to file a surreply in opposition to summary judgment was "not well received because Douse failed to promptly alert the court to her desire to file a surreply." The plaintiff there filed her motion for leave thirteen days after the close of briefing, and "[t]he court was provided no prior notice of Douse's desire to file a surreply." *Id.* at *3. The court stated that it "routinely considers briefing closed upon receipt of a reply unless immediately notified that the opposing party desires to file a surreply," and that the motion "resulted in a waste of judicial resources" because the court had already substantially advanced its consideration of the motion based on the briefs before it. *Id.* at *6. The court was therefore "inclined to deny Douse's motion to file a surreply," and declined to do so only because it was "clear that [the] motion [for judgment on the pleadings] should be granted even considering the surreply." *Id.*

The South Carolina Defendants' delay here was significantly longer than the thirteen days deemed delinquent in *Douse*. They did not notify anyone of their intent to file a surreply until thirty-five days after briefing closed, and did not file the motion for another three days, with no advance notice to the Court. They do not attempt to explain why. The motion for leave is untimely and contrary to the parties' agreed briefing schedule, and therefore should be denied.

IV. CONCLUSION

The South Carolina Defendants' motion for leave seeks to introduce arguments they squandered at least two earlier opportunities to address, and which the City discussed in the first round of remand briefing almost two years ago. The motion is untimely and unwarranted, and should be denied.

Respectfully submitted,

Dated: January 13, 2023

By: */s/ Wilbur Johnson*
Wilbur Johnson

OFFICE OF THE CORPORATION COUNSEL
CITY OF CHARLESTON
WILBUR JOHNSON
Corporation Counsel
JULIA COPELAND
MELISSA CRUTHIRDS
Assistants Corporation Counsel
50 Broad Street,
Charleston, South Carolina 29401
Email: wjohnson@ycrlaw.com
copelandj@charleston-sc.gov
cruthirdsm@charleston-sc.gov

By: */s/ Joseph P. Griffith, Jr.*
JOSEPH P. GRIFFITH, JR.
JOE GRIFFITH LAW FIRM, LLC
946 Johnnie Dodds Blvd.
Mt. Pleasant, South Carolina 29464
Tel: (843) 225-5563
Fax: (843)723-6686
Email: joegriffithjr@hotmail.com

SHER EDLING LLP
VICTOR M. SHER (*pro hac vice*)
MATTHEW K. EDLING (*pro hac vice*)
TIMOTHY R. SLOANE (*pro hac vice*)
100 Montgomery St., Ste. 1410
San Francisco, CA 94104
Tel: (628) 231-2500
Fax: (628) 231-2929
Email: vic@sheredling.com
matt@sheredling.com
tim@sheredling.com

Attorneys for Plaintiff the City of Charleston