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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MATTHEW J. PLATKIN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; and CARI FAIS, ACTING DIRECTOR OF THE NEW JERSEY DIVISION OF CONSUMER AFFAIRS,

Plaintiffs,

v.

EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; BP P.L.C.; BP AMERICA INC.; CHEVRON CORPORATION; CHEVRON U.S.A. INC.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; SHELL PLC; SHELL OIL COMPANY; and AMERICAN PETROLEUM INSTITUTE,

Defendants.

No. 3:22-cv-06733-ZNQ-RLS

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMAND TO STATE COURT

Hon. Zahid N. Quraishi, U.S.D.J.
Hon. Rukhsanah L. Singh, U.S.M.J.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

I. INTRODUCTION

Defendants admit that under recent controlling precedent there is no federal subject-matter jurisdiction over this case, and it must be remanded to state court. *See* Opp. 2. In *City of Hoboken v. Chevron Corp*., 45 F.4th 699 (3d Cir. 2022) ("*Hoboken*"), the Third Circuit considered and rejected each basis for federal jurisdiction Defendants assert here.

In light of that binding precedent, the only remaining question is whether the Court should award Plaintiffs their reasonable costs, including attorney's fees, incurred as a consequence of the removal. *See* 28 U.S.C. § 1447(c). The removal procedure statute's fee-shifting provision is designed "to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party," *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 140 (2005), and the only two outcomes this removal accomplished are cost and delay. Because Defendants "lacked objectively reasonable grounds to believe the removal was legally proper," *id.* at 136 (quoting *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir. 2004)), the Court should award Plaintiffs their fees and costs.

Defendants say they removed, knowing there was no basis to do so, to preserve their argument that "federal common law provides a basis for removing claims purportedly asserted under state law" in the unlikely event the Supreme Court reviews and reverses *Hoboken*. Opp. 5. The Court previewed its answer, and on April 24, 2023, denied five petitions presenting the same question in materially identical cases.[1] The likelihood that the Court will grant the *Hoboken* petition, scheduled to be considered at the Court's forthcoming conference on May 11, is

[1] *See Shell Oil Prods. Co. v. Rhode Island*, __ S.Ct. __, 2023 WL 3046229 (Apr. 24, 2023); *BP P.L.C. v. Mayor & City Council of Baltimore*, __ S.Ct. __, 2023 WL 3046224 (Apr. 24, 2023); *Chevron Corp. v. San Mateo Cnty.*, __ S.Ct. __, 2023 WL 3046226 (Apr. 24, 2023); *Sunoco LP v. City & Cnty. of Honolulu*, __ S.Ct. __, 2023 WL 3046227 (Apr. 24, 2023); *Suncor Energy (U.S.A.) Inc. v. Bd. of Comm'rs of Boulder Cnty.*, __ S.Ct. __, 2023 WL 3046222 (Apr. 24, 2023).

essentially zero. The *Hoboken* decision will not be reviewed in the Supreme Court and will not be reversed. *See infra* Part II.A.

Even if there were any chance the Supreme Court would review *Hoboken*, the record belies Defendants' assertions that they removed purely to preserve the issues presented in the petition for certiorari in that case. Defendants devoted only a small fraction of their voluminous removal materials—comprising a 150-page Notice of Removal ("NOR") with 102 supporting exhibits spanning more than 1,000 pages—to the "federal common law" theory presented in the petition for certiorari in *Hoboken* and in the five petitions recently denied in the *Boulder*, *Baltimore*, *San Mateo*, *Rhode Island*, and *Honolulu* cases. The rest of Defendants' removal materials address issues that the Supreme Court could not consider in *Hoboken* because Defendants elected not to seek certiorari on those grounds, including 80 pages of the NOR dedicated to the acting-under and nexus elements of the federal officer removal test that are not raised in the *Hoboken* petition or any other.[2] *Compare* NOR ¶¶ 15–30 (federal common law) *with* NOR ¶¶ 48–156 (acting-under and nexus prongs of federal officer removal). Defendants' removal here could not "preserve" those issues because they were not preserved in *Hoboken*, meaning the Third Circuit's rejection of them is final. Opp. 3.

Defendants are also incorrect that removing this case and then resisting remand would have been the only way to avoid waiving federal jurisdiction. *See* Opp. 8–9. Defendants removed this case *after* the Third Circuit's controlling decision in *Hoboken.* As Defendants concede, *Hoboken* made clear that in this Circuit removal was improper on the grounds those defendants asserted—grounds identical to the ones advanced here. Defendants' remedy, if any, would come under 28

[2] The defendants' certiorari petition in *Honolulu* was the only one to present a question related to federal officer removal, and it was limited to the colorable federal defense element. *See* Pet. for Writ of Cert., *Sunoco LP v. City & Cnty. of Honolulu*, No. 22-523 (Dec. 2, 2022).

U.S.C. § 1446(b) and Fed. R. Civ. P. 60, which can provide relief when a defendant believes changed circumstances show a case in state court has become removable. *See infra* Part II.B.

Instead, Defendants pursued an improper and inefficient route to "preserve" their asserted right to a federal forum—choosing to remove with no legal basis—which has already delayed the start of state court proceedings by six months. Contrary to Defendants' assertions, they—not Plaintiffs—bear responsibility for the costs incurred litigating this needless, knowingly baseless removal. This Court should therefore exercise its discretion to award Plaintiffs their costs and fees under § 1447(c). *See infra* Part II.B. This removal was meritless, as Defendants readily concede. Their attempts to avoid culpability for removing with no objectively reasonable basis do not withstand scrutiny.

II. ARGUMENT

A. *Hoboken* Requires This Case to Be Remanded, and There Is No Likelihood Defendants Will Prevail on Certiorari.

Defendants concede that their removal arguments are foreclosed by *Hoboken*, and dedicate the bulk of their Opposition to rearguing issues presented in their Motion to Stay, asserting again that there is a "very substantial possibility" the Supreme Court will reverse *Hoboken* on certiorari review. *See* Opp. 4–8. Even if that were so, it would not affect the merits of Plaintiffs' Motion to Remand, which Defendants acknowledge must be granted under current Third Circuit law. *See* Opp. 2.

The Third Circuit's decision in *Hoboken* will, with virtual certainty, remain controlling precedent. In their *Hoboken* petition for certiorari, Defendants ask the Supreme Court to review their theory that state-law claims for climate deception are removable to federal court on the grounds that they are "necessarily and exclusively govern[ed]" by federal common law. Pet. for Writ of Cert. at i, *Chevron Corp. v. City of Hoboken*, No. 22-821 (U.S. Feb. 27, 2023). But less

than two weeks ago, the Supreme Court denied five nearly identical petitions that advanced the same federal-common-law theory of removal in analogous climate deception cases brought by state and local governments against many of the same Defendants sued here. *See supra* n.1. The Supreme Court's denial of those petitions leaves in place judgments from the First, Fourth, Ninth, and Tenth Circuits affirming remand to state court of cases materially identical to Plaintiffs'.[3] In light of those recent denials, Defendants' chances of overturning *Hoboken* are virtually zero.

B. Fees Are Clearly Warranted Here.

A fee award under § 1447(c) is warranted where "the removing party lacked an objectively reasonable basis for seeking removal." *Martin*, 546 U.S. at 141 (2005). As demonstrated in Plaintiffs' Motion to Remand, removal here was objectively unreasonable because the law is "clearly established" by both "a controlling authority in the jurisdiction [and] a robust consensus of persuasive authority" rejecting identical theories of removal in similar cases involving the same defendants. *See MacMillan v. Pa. Air Nat'l Guard*, No. 18-cv-576, 2018 WL 2730883, at *2 (W.D. Pa. June 7, 2018) (cleaned up); Mot. 29–30. Each of Defendants' asserted bases for removal has been rejected by every federal court to consider them, including the Third Circuit in *Hoboken*. *See* Mot. 1 & n.1. That fact alone establishes the lack of any objectively reasonable basis for their removal. *See Vastola v. Sterling, Inc.*, No. 21-cv-14089-ZNQ-LHG, 2022 WL 2714009, at *5 (D.N.J. July 13, 2022) ("Typically, courts award attorneys' fees where it is clear that the complaint does not state a claim removable to federal court.").

[3] *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44 (1st Cir. 2022), *cert. denied*, __ S. Ct. __, 2023 WL 3046229 (U.S. Apr. 24, 2023); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022), *cert. denied*, __ S. Ct. __, 2023 WL 3046224 (U.S. Apr. 24, 2023); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022), *cert. denied*, __ S. Ct. __, 2023 WL 3046226 (U.S. Apr. 24, 2023); *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022), *cert. denied*, __ S. Ct. __, 2023 WL 3046227 (U.S. Apr. 24, 2023); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022), *cert. denied*, __ S. Ct. __, 2023 WL 3046222 (U.S. Apr. 24, 2023).

In arguing otherwise, Defendants insist that removal was necessary to "preserve their removal arguments in the event that the Supreme Court reverses *Hoboken*." Opp. 8. But a pending certiorari petition cannot transform a jurisdictional theory that is squarely foreclosed by Third Circuit precedent into an objectively reasonable basis for removal. To conclude otherwise would render § 1447(c) toothless because a defendant could always avoid sanctions for frivolous removals simply by declaring that it intends to petition the Supreme Court to overturn circuit precedent. That is precisely the sort of jurisdictional "gamesmanship" that § 1447(c) was designed to deter. *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1542 (2021) (observing that § 1447(c) addresses the concern that a defendant will "frivolously add" grounds for removal).

In any event, removal was *not* Defendants' only option for preserving their right to litigate in federal court. Under appropriate circumstances, a defendant might be able to remove a case after the initial 30-day window for removal in response to a development—such as a change in the law—indicating the case "ha[d] become removable." 28 U.S.C. § 1446(b)(3). *See Doe v. Am. Red Cross*, 14 F.3d 196, 198 (3d Cir. 1993) (holding that an "order" under § 1446(b)(3) can include a Supreme Court judgment holding that federal jurisdiction exists over a case involving the same defendant and similar factual and legal issues); *but see A.S. ex rel. Miller v. SmithKline Beecham Corp.*, 769 F.3d 204, 211 (3d Cir. 2014) (characterizing the ruling in *Red Cross* as "narrow and meant to apply in 'unique circumstances'"). Alternatively, a defendant could remove a case, stipulate to remand, and then subsequently seek relief from the remand order under Rule 60 of the Federal Rules of Civil Procedure if the law changed to permit removal. *See* Fed. R. Civ. P. 60(b)(5) ("[T]he court may relieve a party . . . from a final judgment, order, or proceeding" where "it is based on an earlier judgment that has been reversed or vacated . . ."); 28 U.S.C. 1447(d) (permitting review "by appeal or otherwise" of remand orders in cases removed pursuant to the federal officer

statute). But instead of pursuing these or other potentially available options,[4] Defendants adopted a strategy that maximized delay and imposed significant burdens on Plaintiffs and this Court, namely: removing this case to federal court, and then forcing Plaintiffs either to agree to a stay pending the Supreme Court's disposition of their *Hoboken* certiorari petition, or to brief their meritless grounds for removal.

Indeed, Defendants' NOR controverts their insistence that this removal was necessary to "preserve their removal arguments in the event that the Supreme Court overturns *Hoboken*." Opp. 8. Although the certiorari petition in *Hoboken* only raises Defendants' federal-common-law theory of removal, Defendants here dedicate merely thirteen pages—less than ten percent of their NOR—to that theory. *See* NOR ¶¶ 15–30. By contrast, Defendants spend 80 pages—more than fifty percent of the NOR—rehashing federal officer arguments that were rejected in *Hoboken* but are not at issue in any pending petition for certiorari. *See* NOR ¶¶ 48–156. Defendants say that they "assert these removal grounds here to preserve their arguments" because those jurisdictional theories "may be addressed by the U.S. Supreme Court in the near future," NOR at 4; Opp. 3, but that is categorically false for all but Defendants' federal-common-law theory of removal. Defendants never asked the Supreme Court to review *Hoboken's* rejection of their theories of *Grable* jurisdiction, federal officer removal, jurisdiction under the Outer Continental Shelf Lands Act, or federal enclave jurisdiction. Yet they nonetheless asserted those same jurisdictional

[4] Plaintiffs do not concede that Defendants would have qualified to remove this case under either these or other procedural avenues. But, at a minimum, the existence of these statutory alternatives to a removal contrary to recent controlling Circuit caselaw belies their insistence that removal was necessary to "avoid waiving their right" to argue for federal jurisdiction in the future. Opp. 3. Instead, Defendants pursued the only *non-colorable* avenue to "preserve" their arguments—removing on grounds that were squarely foreclosed even before Plaintiffs filed their Complaint.

theories in their NOR here—eleven days *after* filing the *Hoboken* petition. The NOR could not and does not preserve them, despite Defendants' stated reasons for removing this case.

Nor can Defendants "blame" Plaintiffs for the costs incurred fighting their meritless, unnecessary removal. Opp. 10. Plaintiffs resisted Defendants' Motion to Stay because Plaintiffs have a right to prosecute this lawsuit in state court—a right the Third Circuit unequivocally confirmed in *Hoboken*. Defendants' frivolous removal has already delayed that critical prosecution for more than six months, and their request for additional delay (in the form of a stay) does not render this removal any more reasonable. To the contrary, Defendants' requested stay would have kept this case tied up in jurisdictional litigation for even longer than the several months it has taken to brief this removal. Awarding Plaintiffs their fees and costs therefore advances § 1447(c)'s core objective of "deter[ring] removals sought for the purpose of prolonging litigation and imposing costs on the opposing party." *Martin*, 546 U.S. at 141.

III. CONCLUSION

The Court should remand this case to state court and award Plaintiffs reasonable costs incurred due to Defendants' objectively baseless removal.

Dated: May 3, 2023

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CERTIFICATE OF SERVICE

I, Paul Stephan, hereby certify that on May 3, 2023, I caused a true and correct copy of the foregoing Plaintiffs' Reply Memorandum of Law in Support of Motion to Remand to be filed electronically with the Court and served on all parties of record via CM/ECF Notification.

I certify under penalty of perjury that the foregoing is true and correct.

Dated: May 3, 2023

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