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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

COUNTY OF MULTNOMAH,

Plaintiff,

v.

EXXON MOBIL CORP., SHELL PLC F.K.A. ROYAL DUTCH SHELL PLC, SHELL U.S.A., INC., EQUILON ENTERPRISES LLC DBA SHELL OIL PRODUCTS US, BP PLC, BP AMERICA, INC., BP PRODUCTS NORTH AMERICA, INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, MOTIVA

Case No. 3:23-cv-01213-YY

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO REMAND

REQUEST FOR ORAL ARGUMENT

ENTERPRISES, LLC, OCCIDENTAL PETROLEUM F.K.A. ANADARKO PETROLEUM CORP., SPACE AGE FUEL, INC., VALERO ENERGY CORP., TOTALENERGIES, S.E. F.K.A. TOTAL S.A., TOTALENERGIES MARKETING USA F.K.A. TOTAL SPECIALTIES USA, INC., MARATHON OIL COMPANY, MARATHON OIL CORP., MARATHON PETROLEUM CORP., PEABODY ENERGY CORP., KOCH INDUSTRIES, INC., AMERICAN PETROLEUM INSTITUTE, WESTERN STATES PETROLEUM ASSOCIATION, MCKINSEY AND COMPANY, INC., MCKINSEY HOLDINGS, INC., and DOES 1-250 INCLUSIVE,

Defendants.

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I. INTRODUCTION

Plaintiff the County of Multnomah seeks to impose liability on Defendants for alleged impacts of global climate change based on claims of alleged deception and misrepresentation.[1] According to Plaintiff, its claims "hinge on Defendants' culpable conduct in deceptively promoting and concealing the dangers of fossil fuel use." ECF No. 98, at 25. Yet despite alleging a "well-funded, sustained public relations campaign" as the basis of its entire lawsuit, First Amended Complaint ("Complaint"), ECF No. 2-1, at 184 ¶ 13, Plaintiff sued Defendant Space Age Fuel, Inc. ("Space Age"), a small Oregon business that is not alleged to have engaged in any misrepresentation, deceptive conduct, or public relations campaign *at all*. Indeed, apart from listing Space Age in the caption and including a few allegations about Space Age's in-state operations, the Complaint does not state a claim against Space Age, let alone state a legally valid claim.

It is obvious that Plaintiff named Space Age for one reason alone: to evade federal jurisdiction by purporting to join a non-diverse Defendant. But Plaintiff's fraudulent joinder and misjoinder of Space Age cannot divest this Court of jurisdiction. Because Plaintiff has obviously not stated claims against Space Age under well-settled Oregon law, this Court should disregard Plaintiff's attempt to join a non-diverse Defendant in a transparent attempt to keep this lawsuit in state court.

Although the Ninth Circuit has considered removal in the context of similar climate change lawsuits,[2] this case is the first to present the question of diversity jurisdiction based on fraudulent

---

[1] Many Defendants contend that they are not subject to personal jurisdiction in Oregon. Defendants submit this response subject to, and without waiver of, these or any other objections.

[2] *See, e.g.*, *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020) ("*Oakland*"); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022) ("*San Mateo*"); *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022) ("*Honolulu*").

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joinder. When, as here, a plaintiff fails to state a cause of action against the sole non-diverse defendant, and the failure is obvious according to the well-settled rules of the state, that defendant may be disregarded for purposes of diversity jurisdiction under the doctrine of fraudulent joinder. *Allen v. Boeing Co.*, 784 F.3d 625, 634 (9th Cir. 2015) (noting that "a joinder is fraudulent when a plaintiff's failure to state a cause of action against the resident defendant is obvious according to the applicable state law"). The sole non-diverse Defendant in this action, Space Age, has been fraudulently joined in a clear effort to avoid the jurisdiction of this Court. Plaintiff has failed to state a cause of action against Space Age, a family-owned business that owns and operates twenty-one retail fuel and convenience stores and fifteen truck and trailers that supply retail and wholesale fueling facilities. Although alleged misrepresentation is, by Plaintiff's own characterization, the chief predicate of its claims, Space Age is not alleged to have made any false or misleading statement (or any statement at all). Nor is Space Age alleged to have had any special knowledge about any alleged negative effects of fossil fuels, or to have participated in any purported campaign of disinformation, or even to be a member of any trade association claimed to have been involved in misrepresentation. It is telling that in the more than twenty climate change-related cases around the country, this is the *only* action in which Space Age is named as a Defendant—and that, except for a conclusory description of Space Age's basic business operations, Space Age is never again mentioned anywhere in the Complaint. ECF No. 2-1, at 229–31 ¶¶ 158–66.

In the absence of any allegations of deceptive conduct by Space Age, Plaintiff's claims against Space Age obviously fail under well-settled Oregon law. That is dispositive. But if that were not enough, Space Age has also submitted a declaration making clear that it has never engaged in any conduct that might subject it to liability under Plaintiff's theory. *See* Decl. of James C. Pliska In Supp. of Def. Space Age Fuel, Inc.'s Resp. in Opp'n to Pl.'s Mot. to Remand

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("Pliska Decl."). The declaration from Space Age's President confirms that Space Age has never engaged in any marketing campaign, lobbying or advocacy campaign, or research related to greenhouse gases, global warming, or the science of climate change; has never made *any* public statement about the causes, science, or effects of climate change; and has never obtained any information about climate change beyond what has been available to the general public. *Id.* ¶¶ 8–12. Accordingly, Plaintiff obviously cannot state a claim against this Oregon Defendant for claims premised—as Plaintiff's are—on deception and misrepresentation.

Plaintiff's motion to remand should also be denied because Space Age's circumstances are so different from those of the other Defendants that it is procedurally misjoined. At most, the Complaint vaguely alleges that Space Age's business operations in Oregon generate greenhouse gas emissions that somehow render Space Age responsible for climate change—a theory that, if valid, would mean that every business, every human, and even Plaintiff itself could be named as a defendant in this suit. The claims against Space Age arise out of different transactions and occurrences from the other Defendants, in violation of federal joinder rules. Once Space Age's citizenship has been properly disregarded under either of these doctrines, there is complete diversity of citizenship for purposes of federal jurisdiction.

Even aside from fraudulent joinder and procedural misjoinder, there are multiple valid grounds for removal. *First*, this case is removable under the federal officer removal statute because Plaintiff's claims alleging injury from *global* promotion, production, and sale of fossil fuels necessarily encompass some of the Defendants' significant production and sales activities undertaken at the direction of federal officers, including the production of large amounts of specialized, noncommercial grade fuels for the U.S. military and activities during World War II. *Second*, this case is removable under *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*,

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545 U.S. 308 (2005), because Plaintiff's claims necessarily incorporate affirmative federal constitutional elements imposed by the First Amendment. Those two grounds for removal are currently pending before the Ninth Circuit in *City and County of Oakland v. B.P. P.L.C.*, No. 22-16810 (9th Cir.), and *City and County of San Francisco v. B.P. P.L.C.*, No. 22-16812 (9th Cir.). *Third*, Plaintiff's claims are governed exclusively by federal law because they seek damages from *global* emissions that purportedly contributed to *global* climate change.

II. LEGAL STANDARD

Removal from state court is proper if the federal court would have had original jurisdiction of the action. 28 U.S.C. § 1441(a). Federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "The removal process was created by Congress to protect defendants." *Legg v. Wyeth*, 428 F.3d 1317, 1325 (11th Cir. 2005). To justify removal, the removing party need only show that there is federal jurisdiction over a single claim. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559, 563 (2005).

III. ARGUMENT

A. Diversity Jurisdiction Exists Because The Sole Oregon Defendant Was Fraudulently Joined And Procedurally Misjoined.

Defendants removed this case based on diversity jurisdiction because none of the properly joined Defendants shares Oregon citizenship with Plaintiff. In a transparent attempt to evade federal diversity jurisdiction, Plaintiff named as a Defendant a single, family-owned Oregon company, alongside what it characterizes as some of the "world's largest" companies. *See, e.g.*, ECF No. 2-1, at 190 ¶ 26, 219 ¶ 127, 249 ¶ 200. Among the more than two dozen similar climate change suits brought across the country, this is the only one to name Space Age as a Defendant. And for good reason: Space Age is completely disconnected from all of the alleged conduct at

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issue. Although Plaintiff's claims are explicitly predicated upon alleged misrepresentations by Defendants, the Complaint does not allege any misrepresentation or deception by Space Age. Indeed, after the Complaint introduces Space Age, *see* ECF No. 2-1, at 299–31 ¶¶ 158–66, the company is mentioned *nowhere else* in the 204-page pleading.

Plaintiff has not even tried to state a cause of action against Space Age, and the Court should reject Plaintiff's transparent attempt to haul into court a party merely because of its status as a citizen of Oregon. Indeed, it would be fundamentally unfair to allow Plaintiff to drag Space Age—a small, family-owned business with no role in any of the alleged misstatements or marketing at issue in Plaintiff's Complaint—into national litigation to face billions of dollars in potential liability over the alleged impacts of global climate change—and to force it, at the very least, to incur the significant burdens and expenses associated with the litigation—simply because Plaintiff would prefer to avoid federal court.

1. Defendants' Right Of Removal To Federal Court Cannot Be Defeated By Fraudulent Joinder.

When a case is filed in state court and complete diversity exists between opposing parties, Congress has given defendants the right to remove the case to federal court. 28 U.S.C. § 1441(b). This "removal process was created by Congress to protect defendants." *Legg*, 428 F.3d at 1325. Sometimes, however, a plaintiff will join "a non-diverse defendant" to "defeat diversity jurisdiction, even though there is no claim against that non-diverse defendant." *In re Roundup Prods. Liab. Litig.*, 396 F. Supp. 3d 893, 896 (N.D. Cal. 2019). In such cases, "district courts may disregard the citizenship of a non-diverse defendant who has been fraudulently joined." *Grancare, LLC v. Thrower by and through Mills*, 889 F.3d 543, 548 (9th Cir. 2018).

The doctrine of fraudulent joinder is of the utmost importance in the federal judicial system. It protects the right to a federal forum for cases in which parties have diverse citizenship. *See* U.S.

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Const. art. III, § 2, cl. 1; 28 U.S.C. § 1441(b). As the Supreme Court has long recognized, a defendant's "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). Accordingly, when a plaintiff "attempts to sue in the state courts with a view to defeat Federal jurisdiction[,] . . . the Federal courts may, *and should*, take such action as will defeat attempts to wrongfully deprive" defendants of their right to litigate in federal court. *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 182–83 (1907) (emphasis added). "[T]he Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be . . . vigilant to protect the right to proceed in the Federal court." *Id.* at 186.

Fraudulent joinder "exists [i]f a plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the well-settled rules of the state." *United Comput. Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 761 (9th Cir. 2002). The Ninth Circuit has held that the fraudulent joinder inquiry looks to whether there is "a *possibility* that a state court would find that the complaint states a cause of action" against the non-diverse defendant, remarking that this standard "accords" with standards adopted by other circuits that require a plaintiff's claim to be "reasonable" or "colorable." *Grancare*, 889 F.3d at 549; *see also Chicago, R.I. & P. Ry. Co. v. Schwyhart*, 227 U.S. 184, 194 (1913) (removing party must demonstrate either that plaintiff has no "colorable ground" to establish a cause of action against the in-state defendant or that there is no "real intention to get a joint judgment"); *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 620 (10th Cir. 2010); *Schur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 764 (7th Cir. 2009); *Filla v. Norfolk S. Ry. Co.*, 336 F.3d 806, 810 (8th Cir. 2003); *Travis v. Irby*, 326 F.3d 644, 648 (5th Cir.

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2003); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999); *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990).

2. Plaintiff's Claims Are Predicated On Alleged Misrepresentation.

Far from advancing a reasonable or colorable claim against Space Age, Plaintiff has "obvious[ly]" failed to state a cause of action against Space Age according to settled Oregon law—not to mention its own theory of its case. *United Comput. Sys.*, 298 F.3d at 761. A key predicate for all of Plaintiff's claims is purported misrepresentation and deception. Plaintiff admits this explicitly in the Motion, which unequivocally states that "Plaintiff's claims *hinge on Defendants' culpable conduct in deceptively promoting and concealing the dangers of fossil fuel use*, not simply their production and sale of fossil fuels." ECF No. 98, at 25 (emphasis added).

Elsewhere, the Motion affirms that Plaintiff seeks damages for injuries allegedly caused by a "decades-long campaign to discredit the science of global heating" and to "conceal the dangers" posed by fossil fuels. *Id.* at ii. Likewise, by its own characterization, Plaintiff "alleges that Defendants" have contributed to global warming "*while deceiving* consumers and the public about dangers associated" with their products. *Id*. at 1 (emphasis added). At the heart of all of Plaintiff's claims lies a purported "fraudulent marketing, misleading representations, and deliberate concealment *that gave rise to Plaintiff's claims*." *Id*. at 26 (emphasis added).

These characterizations are consistent with the Complaint itself, which describes alleged misrepresentations as a predicate for Plaintiff's claims. Plaintiff's suit "seeks damages and equitable relief for harm caused" by an alleged "scheme" to, among other things, "deceptively promote" fossil fuel products. ECF No. 2-1, at 178 ¶ 1. "Defendants," Plaintiff alleges, "have known and foreseen for decades" the effects of fossil fuel emissions, "but they lied and cynically sought to sow 'scientific' and public doubt." *Id*. at 182 ¶ 10. They purportedly "lied publicly and

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repeatedly" about the harms of fossil fuels, *id*. at 183 ¶ 11, as part of an "enterprise to deceive the public," and their "deception continues to this day." *Id*. at 183 ¶ 11, 183 ¶ 12, 185 ¶ 15; *see also, e.g.*, *id*. at 184 ¶ 13, 184 ¶ 14, 185 ¶ 16, 235 ¶ 178, 247 ¶ 191, 248 ¶ 195, 298 ¶ 333, 300 ¶ 339, 303 ¶ 346, 307 ¶ 355, 361 ¶ 467 (all alleging similarly).

Plaintiff's specific causes of action tell the same story. For example, Plaintiff's public nuisance claim alleges that Defendants' purportedly "deceitful promotion of fossil fuels" would "cause a public nuisance," and it maintains that any social utility from Defendants' activities is outweighed by alleged harms from climate change "*when coupled* with the Defendants' deception of the damage that is wrought therefrom." *Id.* at 374 ¶ 508. Plaintiff's negligence claim does not depend on the mere transportation or sale of petroleum products. Rather, it hinges on Plaintiff's allegations that Defendants knew about alleged risks to global warming posed by fossil fuels but then "concealed" that knowledge and marketed their products "in a manner designed to conceal, downplay, and obfuscate" those risks. *Id*. at 376 ¶ 516. Plaintiff bases its fraud count entirely on purported "misrepresentations, fraudulent statements, and deceptive statements." *Id*. at 377 ¶ 523. And finally, Plaintiff's trespass claim asserts "intentional conduct" insofar as Defendants supposedly "knew" that their products would cause climate change. *Id*. at 379 ¶ 530.

Of course, Defendants deny these allegations. But the important point here is that Plaintiff's case, by its own conception, is premised on alleged misrepresentation and deception by Defendants. Yet, as discussed below, Plaintiff has failed to allege any misrepresentation or deception—or even any statement or communication at all—by Space Age.

3. Plaintiff Does Not Allege Any Misrepresentation Or Similar Conduct By Space Age, Dooming Its Claims Under Its Own Theory.

Because Plaintiff contends that its claims are premised on misrepresentation and deception, both common sense and well-settled Oregon law indicate that, for Plaintiff's claims to be viable

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against Space Age, Plaintiff must allege *some* misrepresentation or similar deceptive conduct by Space Age. But Plaintiff has failed to do so. There is no possibility—let alone a reasonable one—of an Oregon court finding that Plaintiff has stated a cause of action against Space Age, and therefore a finding of fraudulent joinder is appropriate.

a. As explained above, Plaintiff itself characterizes misrepresentation and deception as foundational predicates of its suit and *all* its claims—whether nuisance, negligence, fraud, or trespass.

But even though Plaintiff's theory of its case and each of its causes of action turn on the essential allegation of a misrepresentation or deceptive conduct, the Complaint contains *zero* allegations of this sort regarding Space Age. The only allegations about Space Age are simple descriptions of its business. The Complaint alleges, for example, that Space Age was "organized under the laws of Oregon in 1982," and that the company is a "fossil fuel marketer" and "retail distributor." ECF No. 2-1, at 229 ¶¶ 158, 159. It also alleges that Space Age "owns a retail chain of fuel and convenience stores" under the Space Age, Exxon, and Union 76 brands; "operates twenty-one locations and supplies another 60" facilities, as well as "nine truck and trailers"; transports and delivers its own fossil fuel and those of other companies; sells branded and unbranded products; and consists of four divisions. *Id*. at 229–30 ¶¶ 160, 162–64. The Complaint asserts that Space Age has "experienced rapid growth" and "is one of the largest independent marketers in the State of Oregon." *Id*. at 230 ¶ 161. Finally, the Complaint contends that Space Age is "responsible for substantial GHG emissions from 1982-2023" and that, based on self-reporting to the Oregon Department of Environmental Quality, Space Age "contributed" roughly 7.6 million metric tons of CO_2 in Oregon between 2010 and 2021. *Id*. at 230–31 ¶¶ 165–66. None of this conduct is legally actionable or the basis for Plaintiff's claims.

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Plaintiff does not even pretend to allege that Space Age is responsible for or connected to any of the allegedly tortious conduct underlying Plaintiffs' claims. Space Age is *not* alleged to have made any statement or communication, or engaged in any marketing—false or otherwise—regarding climate change or the environment, or any other topics related to this action. Indeed, the Complaint attributes *no statements or communications to Space Age at all*. Space Age is not alleged to have participated in any scheme of deception or misinformation, in any public relations campaign, or in any political advocacy or lobbying. Space Age is not alleged to have had any early or superior knowledge or understanding of climate-change science, or of the potential negative consequences of fossil fuels, on any level greater than the general public (or Plaintiff itself, for that matter), nor does the Complaint provide any basis for concluding that Space Age might have had such knowledge. And Space Age is not alleged to be a member of any particular trade or industry association named in the Complaint. *See, e.g.*, ECF No. 2-1, at 245 ¶ 187 (alleging members of the American Petroleum Institute ("API")), *id.* at 247 ¶ 192 (alleging members of the Western States Petroleum Association ("WSPA")), *id.* at 303 ¶ 347, 305 ¶ 350 (alleging members of the Global Climate Coalition ("GCC")). There is no thread connecting Space Age with Plaintiff's basic, foundational assertion that "liability under Plaintiff's claims hinges on defendants' wrongful promotion and concealment of the dangers of fossil fuel use, not simply their production and sale of fossil fuels." ECF No. 98, at 27. Because Plaintiff's claims against Space Age rely "simply [on Space Age's] production and sale of fossil fuels," *Id.* at 25, those claims must fail.

In other words, the Complaint does not allege any representation, let alone any false or misleading representation, by Space Age. Although Plaintiff has explicitly premised all of its claims on misrepresentation and deception by Defendants, the Complaint alleges no instance of

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misrepresentation or deception by Space Age. In the absence of any such allegation, Plaintiff has obviously failed to state a cause of action against Space Age.

Space Age's lawful transportation and sale of fossil fuel products—which is all the Complaint alleges—cannot by itself constitute the misrepresentation that is necessary to support Plaintiff's claims, particularly when Space Age's activities are authorized under Oregon law. *See* Pliska Decl. ¶ 6 (explaining how Space Age is licensed by Oregon and operates in compliance with Oregon law); *see also* Restatement (Second) of Torts § 821B, cmt. f (1979) ("Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability."); *Graham v. Multnomah Cnty.*, 158 Or. App. 106, 110 (1999) (complaint for negligence was "fatally deficient" when it "fail[ed] to allege any facts from which a factfinder could determine that defendant's conduct was unreasonable").

Plaintiff's Motion similarly fails to identify anything that could constitute misrepresentation on the part of Space Age. The Motion mentions only two allegations as to Space Age. *First*, Plaintiff points to the allegation in the Complaint that Space Age's lawful business "activities contributed . . . [to] anthropogenic emissions in Oregon." ECF No. 98, at 8 (citing to ECF No. 2-1, at 230–31 ¶¶ 165–66). But the release of greenhouse gas emissions does not constitute misrepresentation or deception, and Plaintiff does not and cannot claim that emissions alone result in liability. Indeed, virtually every commercial (and even non-commercial) activity generates some emissions—from grocery stores to hospitals to schools. As such, the mere allegation that a company "contributes to greenhouse gas emissions" cannot provide a basis for Plaintiff's claims under its own theory of its case.

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If the bare allegation that an entity "contributed" greenhouse gas emissions, ECF No. 2-1, at 231 ¶ 166, were sufficient to impose liability under Plaintiff's deception theory, then any and every individual and entity that has ever "contributed" to greenhouse gas emissions would be liable for involvement in the alleged campaign of climate misinformation alleged by Plaintiff, even if that individual or entity had never actually participated in the campaign or made any statement about climate change at all. As the Second Circuit explained in affirming dismissal of similar climate change claims on the merits: "[E]very single person who uses gas and electricity—whether in travelling by bus, cab, Uber, or jitney, or in receiving home deliveries via FedEx, Amazon, or UPS—contributes to global warming." *City of New York v. Chevron Corp.*, 993 F.3d 81, 86 (2d Cir. 2021). In fact, if Plaintiff's theory were followed to its natural conclusion, Plaintiff *itself* would be subject to liability, merely because it too has contributed to greenhouse gas emissions through its own operations.[3] If Plaintiff intends to assert, contrary to the language in its Complaint and the Motion, such a breathtaking theory of liability, it should say so explicitly. If Plaintiff intends to assert that any entity that emits greenhouse gases during its regular business operations is negligent, or a nuisance, and may be forced to pay damages for the alleged effects of global climate change, it should say so unequivocally and unambiguously. But given that the Complaint does not assert such a theory, and premises its claims on misrepresentation, the mere allegation that Space Age has contributed to greenhouse gas emissions does nothing to state a claim against Space Age.

Second, as the sole "example" of Space Age's involvement in the purported "misinformation campaign," Plaintiff points to a lawsuit, not even mentioned in the Complaint,

[3] Plaintiff reported roughly 10,000 metric tons of greenhouse gas emissions in fiscal year 2020 from its own operations, and greater emissions in previous fiscal years. *See* Multnomah Cnty., *Multnomah County Resource Conservation Report 2020* at 1, Ex. 1 (last visited Oct. 30, 2023).

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that Space Age filed in 2020. ECF No. 98, at 9–10 (citing *Space Age Fuel v. Brown*, No. 20CV26872 (Or. Cir. Ct.)). As described in the Motion, this lawsuit challenged Governor Kate Brown's executive order relating to greenhouse gas emissions on the grounds that it "violated separation of powers principles." *Id.* at 10. Plaintiff offers no support for the assertion that the mere filing of a lawsuit—particularly a lawsuit that, by Plaintiff's own admission, is aimed at protecting the separation of powers—could constitute misrepresentation or deception, much less fraud or a public nuisance. On the contrary, by now attempting to impose liability on Space Age for filing a lawsuit, Plaintiff runs afoul of the *Noerr-Pennington* doctrine, which protects "those who petition any department of the government for redress" from liability—including from "state law tort claims." *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1006–07 (9th Cir. 2008). This protection applies to any "petitioning conduct," including bringing a lawsuit and any "[c]onduct incidental to a lawsuit." *Id.* Plaintiff's attempt to invoke Space Age's lawsuit also plainly violates Oregon's long-recognized litigation privilege, under which statements made in connection with judicial proceedings enjoy an "absolute privilege." *Mantia v. Hanson*, 190 Or. App. 412, 417 (2003). This means that Plaintiff is absolutely barred from bringing civil tort claims (like those asserted here) for statements Space Age may have made in connection with its lawsuit challenging Governor Brown's executive order. Plaintiff's attempt to penalize Space Age for exercising its rights under the First Amendment is precisely what the *Noerr-Pennington* doctrine and Oregon's litigation privilege proscribe.

Moreover, Plaintiff fails to point to any statement made in that lawsuit that might constitute "misinformation." Indeed, Space Age's complaint in the 2020 lawsuit clearly demonstrates that the suit was focused solely on constitutional arguments regarding Governor Brown's authority, and it contains no assertions about the science, causes, or effects of climate change at all. *See*

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Compl., *Space Age Fuel, Inc. v. Brown*, Ex. 2. Thus, when directly confronted on the issue (and roaming freely beyond its own pleadings), the only alleged statement by Space Age is completely irrelevant and nonactionable. Plaintiff's Motion thus demonstrates that Plaintiff cannot support its claim, predicated on alleged misrepresentations, against Space Age.

b. In its Motion, Plaintiff portrays the doctrine of fraudulent joinder as confined to only a narrow set of circumstances. *See* ECF No. 98 at 9. But the Ninth Circuit has regularly found fraudulent joinder where—as here—the plaintiff's allegations, including for misrepresentation, are plainly insufficient to state a cause of action under well-settled state law. For example, in *Morris v. Princess Cruises, Inc.*, a plaintiff whose husband had died after returning from a cruise brought various tort and contract claims related to the incident, including a negligent misrepresentation claim against the sole non-diverse defendant, the travel agency that booked the cruise. 236 F.3d 1061, 1064–67 (9th Cir. 2001). The district court found that this defendant was fraudulently joined, and the Ninth Circuit affirmed. *Id*. at 1067–68. After surveying the elements of negligent misrepresentation under relevant state law, the Ninth Circuit concluded that the representation alleged by the plaintiff—that the travel agency "represented" that the cruise line was "'reputable . . . and that passengers in [its] care would be safely and adequately served'"—"obviously" could not support a claim for misrepresentation, because it was "devoid of any meaningful specificity." *Id*. at 1068. Precisely the same is true here because Plaintiff has wholly failed to allege any specific misrepresentation by Space Age.

There are any number of other examples where the Ninth Circuit has found fraudulent joinder because of insufficient allegations or evidence. *See, e.g.*, *Hoffman v. May*, 313 Fed. App'x 955, 957 (9th Cir. 2009) (holding that the plaintiff "failed to allege facts . . . demonstrating a basis for tort liability" to support equitable indemnity); *Hamilton Materials, Inc. v. Dow Chem. Corp.*,

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494 F.3d 1203, 1206 (9th Cir. 2007) (finding fraudulent joinder when "host of public[ly] available information" reflected that plaintiff's fraud and misrepresentation claims were time-barred); *United Comput. Sys., Inc.*, 298 F.3d at 761–62 (allegations established that defendant was not a party to the contract on which the claims were premised); *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987) (allegations in plaintiff's own complaint made clear that he failed to state any cause of action). Although Plaintiff is correct that fraudulent joinder does not exist if a "searching inquiry into the merits" is required, *Grancare*, 889 F.3d at 549, no searching inquiry is required to determine that Plaintiff has alleged no facts at all that would support its claims against Space Age. Plaintiff cannot state a cause of action against Space Age under well-settled Oregon law and its own theory of the case, and, accordingly, this Court should find that Space Age has been fraudulently joined.

4. The Record As A Whole Further Confirms That Plaintiff's Claims Against Space Age Obviously Fail.

The complete absence of any misrepresentation allegations against Space Age in Plaintiff's Complaint is enough for this Court to find fraudulent joinder and deny Plaintiff's motion to remand. But if more were needed, the declaration submitted by Space Age's President, James C. Pliska, establishes that the company has never been involved in any of the alleged activity that forms the basis for Plaintiff's claims against the other Defendants. Mr. Pliska's declaration confirms the reason why Plaintiff has not included any factual allegations against Space Age in its Complaint that could render its claims viable: because it cannot.

"[T]he party seeking removal is entitled to present additional facts that demonstrate that a defendant has been fraudulently joined." *Grancare*, 889 F.3d at 549; *see also Morris*, 236 F.3d at 1068 ("[f]raudulent joinder claims may be resolved by 'piercing the pleadings' and considering summary judgment-type evidence such as affidavits and deposition testimony") (citing *Cavallini*

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v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 263 (5th Cir. 1995)). This is in accord with holdings in numerous other circuits. *See, e.g.*, *Gentek Bldg. Prods, Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007); *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1380 (11th Cir. 1998). Indeed, "[w]hen a removing party presents evidence that establishes a claim of fraudulent joinder, . . . the Court has no authority to grant a motion to remand based on the possibility that future discovery may reveal a factual basis to dispute the unchallenged evidence of record." *DaCosta v. Novartis AG*, 180 F. Supp. 2d 1178, 1183 (D. Or. 2001). Accordingly, this Court should consider Mr. Pliska's declaration when evaluating whether Space Age has been fraudulently joined.

As Mr. Pliska's declaration explains, Space Age is a "small, family-owned and operated Oregon business" founded by Mr. Pliska and his father in 1982. Pliska Decl. ¶ 4. As documented above, all of Plaintiff's claims are premised on a purported "deceptive[]" "scheme" by the other Defendants, ECF No. 2-1, at 178 ¶ 1, which "sought to sow . . . public doubt" through a "well-funded, sustained public relations campaign," *id*. at 182–83 ¶ 10, 184 ¶ 13. But, as Mr. Pliska explains, Space Age has never engaged in any marketing campaign, lobbying, or advocacy campaign related to greenhouse gases, global warming, or the science of climate change. Pliska Decl. ¶¶ 8, 9, 11. In fact, Space Age has never made *any* public statement about the causes or science of climate change, the impact of Space Age's products or fossil fuel products generally on climate change, or the effects of climate change. *Id.* ¶ 10.

Plaintiff's claims also rest on its assertion that Defendants had special or early knowledge, from their own research and studies on climate change, of the alleged harm from their products, but concealed this knowledge from the public and Plaintiff. *See, e.g.*, ECF 2-1 at 182–83 ¶ 10 ("Defendants have known and foreseen for decades that their fossil fuel pollution" would cause harm), *id.* at 185 ¶ 15(b) (Defendants' "own scientists confirmed that global climate change was a

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genuine and serious threat"), *id.* at 235 ¶ 178 ("Decades ago, the Fossil Fuel Defendants knew that their fossil fuel activities would substantially contribute" to greenhouse gases). But Space Age has never conducted research related to greenhouse gases, global warming, or the science of climate change. *Id.* ¶ 11.

Moreover, Space Age has never had any special or unique knowledge about climate change, *i.e. any* knowledge that was not generally and publicly available to the world, including Plaintiff. As Mr. Pliska notes, "Space Age never obtained any information about greenhouse gases, global warming, or the science of climate change beyond what has been available to the general public." Pliska Decl. ¶ 12. This means that Plaintiff also could not state a claim for failure to warn—a claim it has never raised—because, under well-settled Oregon law, a seller is not required to give warning of a danger when the danger is "generally known." *Benjamin v. Wal-Mart Stores, Inc.*, 185 Or. App. 444, 454 (2002); *Mayorga v. Costco Wholesale Corp.*, 302 F. App'x 748, 749 (9th Cir. 2008) ("Under Oregon law the legal duty to warn arises only as to hazards that are not generally known and recognized, that is, that are not obvious.") (collecting cases). Indeed, the Complaint itself makes clear that the potential consequences of climate change have been widely discussed for decades. *See, e.g.*, ECF No. 2-1, at 315–16 ¶¶ 366–68 (describing the "newsworthy" 1992 Earth Summit of "172 world governments" regarding climate change, which marked a "shift in public discussion of climate change"), *id.* at 347 ¶ 431 (noting opinion polls from around 1991 that "revealed 60% of Americans believed global warming was a serious environmental problem").[4] Thus, insofar as Plaintiff's claims against Space Age are premised on

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[4] In fact, it is a matter of public record that Plaintiff itself has been aware of these issues for decades. For example, in 2001 Plaintiff and the City of Portland jointly released a "Local Action Plan on Global Warming," which noted in its very first paragraph that "[g]lobal climate change presents one of the foremost threats . . . of the new century," and that "[t]here is broad agreement in the scientific community that human activities are contributing to" climate change, "largely by

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an alleged failure to warn, they must fail, because the only knowledge Space Age can plausibly be said to have had about climate change was the same general knowledge held by the public—which, as a matter of law, cannot form the basis for a duty to warn.

Plaintiff also bases its claims on the allegation that the purported misinformation campaign was conducted by and through several industry organizations, such as API, WSPA, GCC, and the Heartland Institute. *See, e.g.*, ECF No. 2-1, at 183–84 ¶ 12 (Fossil Fuel Defendants "mobilized" the GCC to "fund[] a marketing campaign"), *id.* at 247 ¶ 191 (API "coordinated and participated in a deliberate misinformation campaign"), *id.* at 248 ¶ 195 ("WSPA has coordinated and participated in a deliberate misinformation campaign"), *id.* at 359 ¶ 464 (Heartland Institute "provides a medium through which Defendants have propagated" alleged misinformation). But, as Mr. Pliska's declaration again makes clear, Space Age has never been a member of API, WSPA, GCC, or the Heartland Institute (and Plaintiff does not even allege the contrary). Space Age has never participated in a meeting of any of these organizations, received any information from these organizations, taken any action on their behalf, or played any role in any alleged disinformation campaign by them. Pliska Decl. ¶ 13.

Finally, as to Space Age's 2020 lawsuit, Mr. Pliska explains that Space Age was motivated to file suit because it was concerned that the executive order exceeded the Governor's legal powers and could harm businesses like Space Age. Pliska Decl. ¶¶ 14, 15. But the suit did not make any allegations about the causes, science, or impact of climate change, nor did Space Age make any public statements on those issues in the context of the suit. *Id.* ¶¶ 16, 18. The "sole issue in the 2020 lawsuit" was the Governor's power under the Oregon Constitution to issue greenhouse gas

releasing carbon dioxide in the atmosphere through burning fossil fuels." City of Portland and Multnomah County, *Local Action Plan on Global Warming* at 1 (Apr. 2001), Ex. 3.

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standards by executive order. *Id.* ¶ 16. Space Age did not file suit on the basis of any information about global warming not available to the public, and Space Age did not have any interaction with any of the organizations discussed above in doing so. *Id.* ¶¶ 17, 19.

Plaintiff's failure to lodge any allegations against Space Age that might provide a basis for its claims is ample reason for this Court to find fraudulent joinder.[5] But Mr. Pliska's declaration, which is properly considered, is fatal to Plaintiff's claims. Plaintiff's claims are all premised on misinformation, but Plaintiff has alleged no misinformation on the part of Space Age, and Mr. Pliska's declaration makes clear that there was none. Plaintiff has obviously failed to state any claim against Space Age according to well-settled Oregon law. Accordingly, the Court should find that Space Age was fraudulently joined, and retain jurisdiction over Plaintiff's suit.

5. In Addition To Being Fraudulently Joined, Space Age Was Procedurally Misjoined.

Not only has Space Age been fraudulently joined in this action, it has also been procedurally misjoined. The concept of procedural misjoinder—also known as fraudulent misjoinder—"is a logical extension of the established precedent that a plaintiff may not fraudulently join a defendant in order to defeat diversity jurisdiction in federal court." *Greene v. Wyeth*, 344 F. Supp. 2d 674, 684–85 (D. Nev. 2004). A defendant has been procedurally misjoined if its inclusion does not comply with Federal Rule of Civil Procedure 20. Under Rule 20, claims must "aris[e] out of the same transaction" or "occurrence" to be properly joined. Fed. R. Civ. P. 20(a)(2)(A).[6] Procedural misjoinder permits a district court to sever a plaintiff's claims against a

[5] In *Richards for Estate of Ferris v. U-Haul Int'l, Inc.*, 2023 WL 4146185, at *6 (D. Or. June 22, 2023), Judge Hernández properly relied on declarations in denying a motion to remand on the basis of fraudulent joinder.

[6] Some courts have left unresolved whether the federal or state joinder rule should be applied when deciding procedural misjoinder. *See Sutton v. Davol, Inc.*, 251 F.R.D. 500, 504–05 (E.D. Cal. 2008). But the relevant Oregon rule is identical, *see* ORCP 28A, so the analysis is the same in either case.

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non-diverse defendant, and retain jurisdiction over the remainder of the case. Because Plaintiff's claims against Space Age arise out of a different "series of transactions or occurrences" compared to its claims against the other Defendants, Plaintiff's claims against Space Age do not comply with Rule 20, and Space Age is procedurally misjoined.

As Plaintiff concedes, the Ninth Circuit has not ruled one way or the other regarding procedural misjoinder. ECF No. 98, at 12–13. A number of district courts within the Ninth Circuit have, however, endorsed the doctrine. *See Greene*, 344 F. Supp. 2d at 683–85; *Hinrichs v. Burwell*, 2021 WL 1341083, at *2–4 (W.D. Wash. Feb. 23, 2021), *report and recommendation adopted*, 2021 WL 1338516 (Apr. 9, 2021); *Anglada v. Bank of Am. Corp.*, 2011 WL 5196710, at *4 (D. Nev. Oct. 21, 2011); *Sutton v. Davol, Inc.*, 251 F.R.D. 500, 503–05 (E.D. Cal. 2008). And many other courts across the country have done so. *See, e.g.*, *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated on other grounds by Cohen v. Off. Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000); *Palermo v. Letourneau Tech., Inc.*, 542 F. Supp. 2d 499, 511–25 (S.D. Miss. 2008); *Ashworth v. Albers Med., Inc.*, 395 F. Supp. 2d 395, 409–413 (S.D. W. Va. 2005).

As these courts have recognized, "the rights of the parties and the interest of justice" may be "best served by severance," particularly when the joinder of the non-diverse defendant "is procedurally inappropriate and clearly accomplishes no other objective than the manipulation of the forum." *Greene*, 344 F. Supp. 2d at 685. In these circumstances, "other interests prevail over that of permitting a plaintiff's choice of forum." *Id.* After all, "[m]isjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action." *Tapscott*, 77 F.3d at 1360.

The only substantive argument that Plaintiff makes against procedural misjoinder is that it is procedurally "circular," in that it requires courts to evaluate the factual allegations of the

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complaint before ruling on jurisdiction. ECF No. 98, at 13–14. But federal courts routinely examine the allegations of the complaint to adjudicate jurisdiction, including in the removal context—for example, with fraudulent joinder. *See, e.g.*, *McCabe*, 811 F.2d at 1339. And, in the analogous context of the forum-defendant rule, federal courts may consider whether a defendant has been "properly joined" sufficient to exercise jurisdiction, which necessarily requires considering the nature of a complaint's allegations. *See* 28 U.S.C. § 1441(b)(2). Plaintiff does not attempt to explain why these procedures are workable, but procedural misjoinder is not. This Court should follow the lead of the courts above and apply procedural misjoinder.

Indeed, the circumstances of this case cry out for application of procedural misjoinder. Here, even if Plaintiff's claims against Space Age were cognizable, they do not arise out of the same transaction or occurrence as the claims alleged against the other Defendants. As discussed, Space Age is not alleged to be involved in the exploration, production, or refining of fossil fuels, to have made any statement or communication regarding climate change or the environment, or to have been a member of any of the relevant industry associations. It operates on a vastly smaller scale than any of the other Defendants, in a different line of business, and is entirely disconnected from the purported scheme of deception that forms the key predicate of Plaintiff's claims against the other Defendants. *See supra* at 18–28; *see also, e.g.*, ECF No. 2-1, at 13 ¶¶ 26–30, 21 ¶ 58, 24 ¶¶ 67–68, 44–46 ¶¶ 149–57, 59 ¶ 195; Pliska Decl. ¶¶ 4–5. Indeed, Space Age's connection to this lawsuit makes about as much sense as would joining a local car dealership (say, Ron Tonkin Chevrolet) to the United Auto Workers' labor dispute with the Big 3 U.S. automakers (GM, Ford, and Stellantis)—that is, no sense at all. Thus, Plaintiff's claims against Space Age arise out of a distinct "series of transactions or occurrences" from those of the other Defendants. *See* *Underwood v. 1450 SE Orient, LLC*, 2019 WL 1245805, at *4 (D. Or. Jan. 28, 2019) (granting a

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motion to sever "retail defendants" under Rule 20(a) because claims against them did not involve the "same transactions and occurrences" as claims against "producer defendants"), *report and recommendation adopted*, 2019 WL 1246194 (D. Or. Mar. 18, 2019).

Plaintiff barely attempts to argue otherwise, asking this Court to take its word that Defendants' argument is "without merit." ECF No. 98, at 14. This is insufficient. *See, e.g.*, *Mays v. Deschutes Cnty.*, 2016 WL 6824377, at *1 n.3 (D. Or. Nov. 16, 2016) ("Arguments made in passing and inadequately briefed are waived."). With procedural misjoinder, as with fraudulent joinder, this Court should reject Plaintiff's transparent attempt to evade federal jurisdiction.

* * *

This Court should be "vigilant to protect" Defendants' "right to proceed" in federal court, notwithstanding Plaintiff's attempt to defeat diversity jurisdiction by baselessly joining Space Age as a Defendant. *Wecker*, 204 U.S. at 186. Given the complete lack of allegations against Space Age sufficient to support Plaintiff's claims against the company, this Court should find that Space Age has been fraudulently joined or, in the alternative, procedurally misjoined.

B. This Court Also Has Jurisdiction Under The *Grable* Doctrine And The Federal Officer Removal Statute.

Removal was also proper pursuant to the *Grable* doctrine, and because Plaintiff's claims relate to Defendants' acts undertaken at the direction of federal officers. These issues are currently pending before the Ninth Circuit in *Oakland* and *San Francisco*, which will likely be dispositive of those arguments here. Accordingly, Defendants only briefly summarize these arguments here, which are explained in more detail in Defendants' Notice of Removal, which Defendants incorporate by reference.

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1. This Action Was Properly Removed Under The *Grable* Doctrine.

First, Plaintiff's action was properly removed under *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). Suits alleging only state-law causes of action nevertheless "arise under" federal law if the "state-law claim[s] necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314. Here, Plaintiff admits that its claims "hinge on" Defendants' speech as to their alleged promotion of fossil fuels, ECF No. 98, at 25, and attempts to impose liability on Defendants for engaging in a "public relations campaign" and attempting to affect "public debate." ECF No. 2-1, at 184 ¶ 13, 307 ¶ 355, 361 ¶ 467. As a result, Plaintiff's claims necessarily incorporate affirmative federal constitutional elements imposed by the First Amendment and arise under federal law for purposes of *Grable* jurisdiction.

The Supreme Court has made clear that when nominally state-law tort claims target speech on matters of public concern, the First Amendment injects affirmative federal-law elements into the plaintiff's cause of action, including factual falsity, actual malice, and proof of causation of actual damages. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774–76 (1986) (state common-law standards "must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 285–86 (1964) (public officials suing for libel have the burden of proving with "convincing clarity" that "the statement was made with 'actual malice'"); *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) ("[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.").

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Plaintiff responds that these issues are merely "defenses." *See* ECF No. 98, at 28–32. But the Supreme Court and Ninth Circuit have expressly held that these issues are actually constitutionally required federal-law *elements* of the plaintiff's cause of action, for which the *plaintiff* "bear[s]" the burden of proof—by clear and convincing evidence—*as a matter of federal law*. *See Hepps*, 475 U.S. at 774–76; *Sullivan*, 376 U.S. at 279–80, 285–86 (plaintiff public officials bear burden of proving with "convincing clarity" that "statement was made with 'actual malice'"). Indeed, the Ninth Circuit has referred to "actual malice" as one of the "elements of a defamation claim," describing this "requirement" as "derived . . . from the constitutional guarantee enshrined in the First Amendment." *Rattray v. City of Nat'l City*, 51 F.3d 793, 801 (9th Cir. 1994); *see also Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013) (discussing the "heightened standard of proof for defamation established in" *New York Times Co. v. Sullivan*). The Motion cites to no binding Ninth Circuit precedent—nor any case law from this Court—to the contrary. The only two Ninth Circuit cases cited in Plaintiff's *Grable* rejoinder contain no discussion at all of the First Amendment argument advanced here. *See* ECF No. 98, at 28 (citing *San Mateo*, 32 F.4th at 746), 33 (citing *City of Oakland*, 969 F.3d at 907).

Accordingly, federal jurisdiction exists over the misrepresentational aspects of Plaintiff's claims under *Grable*: when "a court will have to construe the United States Constitution" to decide Plaintiff's claim, the claim "necessarily raise[s] a stated federal issue" under *Grable*, and federal jurisdiction is proper. *Ortiz v. Univ. of Med. & Dentistry of N.J.*, 2009 WL 737046, at *3 (D.N.J. Mar. 18, 2009).

The Court may entertain claims like Plaintiff's "without disturbing any congressionally approved balance of federal and state judicial responsibilities," *Grable*, 545 U.S. at 314, because they are not standard state-law misrepresentation claims between private parties. Instead,

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Plaintiff's lawsuit is an attempt by a *governmental entity* to burden private speech on *matters of public concern*. This implicates the very core of the First Amendment's protections. "[C]limate change" is among the "controversial subjects" and "sensitive political topics" where freedom of speech "merits 'special protection.'" *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2476 (2018) (citation omitted). Indeed, "[c]limate change has staked a place at the very center of this Nation's public discourse," and "its causes, extent, urgency, consequences, and the appropriate policies for addressing it" are "hotly debated." *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 347–48 (2019) (Alito, J., dissenting from denial of certiorari). Freedom of speech is "most seriously implicated . . . in cases involving disfavored speech on important political or social issues," including climate change, which is "one of the most important public issues of the day." *Id.* at 344, 346, 348 (noting that a federal forum is especially warranted in suits "concern[ing] a political or social issue that arouses intense feelings," because "a plaintiff may be able to bring suit in whichever jurisdiction seems likely to have the highest percentage of jurors who are sympathetic to the plaintiff 's point of view").

Moreover, Plaintiff is a public, governmental entity seeking to use the machinery of its own state courts to impose government-mandated burdens on Defendants' nationwide speech on issues of national concern. First Amendment interests are at their apex where, as here, a governmental entity seeks to use state law to regulate speech on issues of "public concern." *Hepps*, 475 U.S. at 775; *see also Sullivan*, 376 U.S. at 264 ("[An] action brought by a public official against critics of his official conduct" "require[s]" "safeguards for freedom of speech."). Given the uniquely compelling federal interests at stake here, federal courts may entertain the claims at issue "without disturbing any congressionally approved balance of federal and state judicial responsibilities," making removal appropriate. *Grable*, 545 U.S. at 314. And because *Grable* will

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provide federal jurisdiction over state-law misrepresentation claims in limited contexts, Plaintiff's contention that "Defendants' theory would dramatically expand *Grable* and federal subject matter jurisdiction," ECF No. 98, at 34, is meritless.

Nor is Plaintiff correct in asserting that Plaintiff's claims do not raise a substantial federal issue. As noted, Plaintiff is attempting to use state tort law to penalize Defendants' speech on vital, high-profile matters of public discourse. The protection of these First Amendment interests is undoubtedly of "importance . . . to the federal system as a whole," *Gunn v. Minton*, 568 U.S. 251, 260 (2013), such that there is a "national interest in providing a federal forum" to address them. *Grable*, 545 U.S. at 310. Indeed, recourse to a federal forum is especially warranted in suits "concern[ing] a political or social issue that arouses intense feelings," because "a plaintiff may be able to bring suit in whichever jurisdiction seems likely to have the highest percentage of jurors who are sympathetic to the plaintiff's point of view." *Mann*, 140 S. Ct. at 346 (Alito, J. dissenting). *See also San Mateo*, 32 F.4th at 748 (noting that the "interpretation of a federal . . . constitutional issue" can present a "substantial question of federal law"). Given the compelling federal issues at stake, Plaintiff's state-law misrepresentation claims incorporate federal constitutional elements and provide an independent basis for this Court to exercise jurisdiction under *Grable*.

2. This Action Was Properly Removed Under The Federal Officer Removal Statute.

Federal jurisdiction also exists under 28 U.S.C. § 1442(a)(1) because a significant portion of Defendants' fossil fuel production and sales, including their production of large volumes of specialized fuels for the U.S. military and extensive activities during World War II, were undertaken at the direction of federal officers. These activities necessarily relate to Plaintiff's alleged injuries, which Plaintiff claims arose from the cumulative impact of Defendants' historical production, promotion, sale, and use of oil and gas. *See* ECF No. 2-1, at 252 ¶ 210.

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Defendants acted under federal officers. "The words 'acting under' are broad." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007). While "simply *complying* with the law" is not enough, the requirement is generally satisfied where a defendant engages in an "effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id.* at 152 (emphases in original). To distinguish mere compliance from assistance, courts consider whether "the private contractor . . . is helping the Government to produce an item that it needs." *Id.* at 153. In the words of the Supreme Court: "The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." *Id.* For this reason, "[c]ourts have consistently held that the 'acting under' requirement is easily satisfied where a federal contractor removes a case involving injuries arising from a product manufactured for the government." *Moore v. Elec. Boat Corp.*, 25 F.4th 30, 35 n.3 (1st Cir. 2022) (collecting cases). Removal under the statute was proper here for two reasons.

First, during World War II, the U.S. government controlled when, where, and how several of the Defendants extracted and produced oil and gas, and Defendants operated many oil and gas facilities on the government's behalf. During that time, the United States pursued full production of its oil reserves and created agencies to *control* the petroleum industry, including Defendants' predecessors and affiliates.[7] The U.S. government built refineries, directed the production of certain products, and managed scarce resources for the war effort. As Senator O'Mahoney, Chairman of the Special Committee Investigating Petroleum Resources, put it in 1945, "[n]o one who knows even the slightest bit about what the petroleum industry contributed to the war can fail

[7] The Complaint conflates the activities of Defendants with those of their predecessors, subsidiaries, and affiliates. Defendants reject these attributions, but describe the conduct of certain predecessors, subsidiaries, and affiliates to show that the Complaint, as pleaded, should remain in federal court.

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to understand that it was, without the slightest doubt, one of the most effective *arms of this Government* . . . in bringing about a victory." ECF No. 2-34, at 5 (emphasis added). And as two former Chairmen of the Joint Chiefs of Staff explained, the "history of the Federal Government's control and direction of the production and sale of gasoline and diesel to ensure that the military is 'deployment-ready'" spans "more than a century," and during their tenure, petroleum products were "crucial to the success of the armed forces." ECF No. 2-41, at 13–14.

Multiple courts have found that the federal government exerted control over Defendants during World War II to ensure the supply of fuel, such as high-octane avgas. "Because avgas was critical to the war effort, the United States government exercised significant control over the means of its production during World War II." *United States v. Shell Oil Co.*, 294 F.3d 1045, 1049 (9th Cir. 2002); *see also Exxon Mobil Corp. v. United States*, 2020 WL 5573048, at *14 (S.D. Tex. Sept. 16, 2020) ("The government . . . used [its] authority to control many aspects of the refining process and operations.").

Second, the expanded evidentiary record that the defendants in *City of Oakland* submitted in that case (which has also been submitted here) substantiates Defendants' extensive fossil fuel production at the direction of federal officers since World War II, including decades of producing specialized fuels for the U.S. military according to the government's specifications. For example, Professor Mark Wilson explains that "[b]y 2010, the U.S. military remained the world's biggest single purchaser and consumer of petroleum products" and, "[a]s it had for decades, the military continued to rely on oil companies to supply it under contract with specialty fuels, such as JP-5 jet aviation fuel and other jet fuels, F-76 marine diesel, and Navy Special Fuel." ECF No. 2-3, ¶ 40. "[I]n the absence of . . . [these] contract[s] with [Defendants], the Government itself would have had to perform" these essential tasks to meet its critical fuel demands. *Baker v. Atl. Richfield Co.*,

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962 F.3d 937, 942 (7th Cir. 2020). For example, during the Cold War, Shell Oil Company (now known as Shell USA, Inc.) developed and produced for the federal government specialized jet fuel to meet the unique performance requirements of the U-2 spy plane and later the OXCART and SR-71 Blackbird programs. *See* ECF No. 1, at 25–26. In providing specialized fuel and facilities under contracts for the federal government's overhead reconnaissance programs, Shell Oil Company acted under federal officers. *See, e.g.*, ECF No. 2-12, at 1 ("This work is under the technical direction of Colonel H. Wilson.").

As another example, BP entities provided approximately 1.5 billion gallons of specialized military fuels for the DOD's use in *the four years from 2016 to 2020 alone*. ECF No. 2-30, at 6. These fuels include JP-5, JP-8, and F-76, together with fuels containing specialized additives, including fuel system icing inhibitor ("FSII"), corrosion inhibitor/lubricity improver ("CI/LI") and, for F-76 fuels, lubricity improver ("LIA"). *Id.* at 1–6. Such additives are essential to support the high performance of the military engines they fueled. FSII is required to prevent freezing caused by the fuels' natural water content when military jets operate at ultra-high altitudes, potentially leading to engine flameout, while CI/LI and LIA are used to avoid engine seizures and to ensure fuel handling system integrity when military fuels are stored for long periods, as on aircraft carriers. ECF No. 2-31; ECF No. 2-32. And, from at least 2010 to 2013, Shell Oil Company or its affiliates entered into billion-dollar contracts to supply specialized JP-5 and JP-8 military jet fuel. ECF No. 2-19—ECF No. 2-27. The DOD's detailed specifications require that these fuels "shall be refined hydrocarbon distillate fuel oils" made from "crude oils" with "military unique additives that are required by military weapon systems." ECF No. 2-28, at 5, 10, §§ 3.1, 6.1; ECF No. 2-29, at 5, 11, §§ 3.1, 6.1.

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As an amicus brief from two former Chairmen of the Joint Chiefs of Staff makes clear: "For more than a century, petroleum products have been essential for fueling the United States military around the world." *City & Cnty. of Honolulu v. Sunoco LP*, No. 21-15313 (9th Cir.), Dkt. 49 at 3. Thus, "oil and gas products produced by . . . Defendants have been and continue to be critical to national security, military preparedness, and combat missions." *Id.* at 5. To ensure supply, "the Federal Government has . . . incentivized, directed and contracted with Defendants to obtain oil and gas products, including specialized jet fuels," and "[a] substantial portion of the oil and gas used by the United States military are non-commercial grade fuels that are developed and produced by private parties, including many of the Defendants here, under the oversight and direction of military officials." *Id.* at 6. The contracts to produce such fuels "were not typical commercial agreements," because they required Defendants "to supply fuels with unique additives to achieve important objectives." *Id.* at 20.

Defendants' activities under federal officers "relat[e] to" Plaintiff's claims and alleged injuries. 28 U.S.C. § 1442(a)(1). "By the Removal Clarification Act, Congress broadened federal officer removal to actions, not just causally connected, but alternatively connected or associated, with acts under color of federal office." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc). Plaintiff alleges injury from cumulative greenhouse gas emissions from Defendants' global production, promotion, and sale of fossil fuels, which necessarily encompass federally directed activities that produced emissions across decades. *See, e.g.*, ECF No. 2-1, at 245 ¶ 185. And contrary to Plaintiff's suggestion (ECF No. 98 at 26), Defendants need not show "that the complained of conduct itself was at the behest of the federal agency." *Baker*, 962 F.3d at 944.

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Defendants also have raised colorable federal defenses, including government contractor immunity. ECF No. 1, at 40. The Notice of Removal explains at length why this defense in particular is colorable. Plaintiff argues that the defense cannot apply to claims based on "wrongful promotion," (ECF No. 98, at 27), but Plaintiff alleges that it suffered harm from wrongful promotion that led to increased production and sale of fossil fuels and consequent emissions.

In sum, federal officer removal is thus proper because (1) Defendants "'act[ed] under' federal officers," (2) "Plaintiffs' injuries were for or relating to Defendants' actions," and (3) Defendants "can assert a colorable federal defense." *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1106 (9th Cir. 2022) ("*Honolulu*").

3. Defendants Are Not Precluded From Raising Arguments Under The *Grable* Doctrine Or Federal Officer Removal.

Plaintiff argues that Defendants should be precluded from raising these arguments because some (but not all) Defendants have raised similar issues in other cases before other courts. ECF No. 98, at 14–17. The doctrine of offensive nonmutual issue preclusion, or "collateral estoppel," however, is manifestly inappropriate here, and its application would be unfair and unwarranted under the circumstances.

Offensive nonmutual issue preclusion is appropriate "only if (1) there was a full and fair opportunity to litigate the identical issue in the prior action; (2) the issue was actually litigated in the prior action; (3) the issue was decided in a final judgment; and (4) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action." *Syverson v. Int'l Bus. Machs. Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007) (citations omitted). Moreover, even when those necessary elements are met, the district court still has "broad discretion" in deciding "whether to apply offensive nonmutual issue preclusion." *Id*. This is because—as the Supreme Court has warned—the doctrine "may also be unfair to a defendant" and "does not promote judicial

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economy in the same manner" as defensive issue preclusion. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329–31 (1979). The party "seeking collateral estoppel" has the burden "to establish that [the] requirements of collateral estoppel are met." *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1033 (9th Cir. 2001) (internal citation omitted). For myriad reasons, Plaintiff cannot meet its burden here.

First, the most basic requirement of nonmutual offensive issue preclusion is not met: not all Defendants in this action were parties, or "in privity with" parties, in the prior cases cited by Plaintiff. Offensive nonmutual issue preclusion requires "the same defendant," *Flood v. Just Energy Mktg. Corp.*, 904 F.3d 219, 236 (2d Cir. 2018), or the party must have been "a party or in privity with a party to the prior action," *Syverson*, 472 F.3d at 1078. The Supreme Court has explained that a "significant safeguard" protecting against the unfairness of offensive nonmutual issue preclusion is "the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate" the issue in a prior proceeding. *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 329 (1971); *see also Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (holding that the application of issue preclusion "to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'").

Here, Plaintiff has named twenty-five individual Defendants. ECF No. 2-1, at 189–235 ¶¶ 23–175. Of these twenty-five Defendants, approximately one-third have never been a party in *any* of the cases cited by Plaintiff to justify preclusion. *See* ECF No. 98, at 15–16, 16 n.11.[8] Indeed, Plaintiff concedes as much, asserting only that this case involves "*largely* the same group

[8] Specifically, none of the following Defendants in this action was a party to any of the cases cited by Plaintiff: Equilon Enterprises LLC; Motiva Enterprises, LLC; Valero Energy Corp.; Peabody Energy Corp.; Koch Industries, Inc.; the Western States Petroleum Association; McKinsey & Company; McKinsey Holdings; and Space Age. An even greater number of Defendants were named as defendants only in some of those cases.

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of defendants." *Id*. at 15 (emphasis added). Nor does Plaintiff offer any argument for showing "privity with" prior defendants. In other words, Plaintiff seeks to bind nine Defendants to the results of cases in which they were not parties and were not involved. Plaintiff cites no authority for this startling proposition, and there is none. Because offensive nonmutual issue preclusion is appropriate only if each party had a "full and fair opportunity to litigate the identical issue," *Syverson*, 472 F.3d at 1078, an attempt to bind parties who were not defendants in the prior action "deprive[s]" such parties "of their day in court" and constitutes "insurmountable" error. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338, 341 (5th Cir. 1982). Other courts have held that, even if issue preclusion were appropriate for those defendants that were parties in the prior action (which is not the case here), the complications introduced by the presence of defendants that were not prior parties "require[s] more time and effort than applying collateral estoppel would save." *Bertrand v. Johns-Manville Sales Corp.*, 529 F. Supp. 539, 545 (D. Minn. 1982); *see also In re Light Cigarettes Mktg. Sales Pracs. Litig.*, 691 F. Supp. 2d 239, 251 (D. Me. 2010) ("Applying issue preclusion to PM and not to Altria would yield few efficiency benefits and would likely confuse the jury."); *Roybal v. City of Albuquerque*, 2009 WL 1329834, at *11 (D.N.M. Apr. 28, 2009) ("Because these two new Defendants are not in privity with the earlier defendants, the Court will have to decide the motion for summary judgment on the merits of the Fourth Amendment issues anyway.").

Second, Plaintiff otherwise falls short of meeting the basic requirements for offensive nonmutual issue preclusion: the issues in this case are not "identical" to those in the cited prior actions, nor were they always "actually litigated" or finally "decided." *Syverson*, 472 F.3d at 1078. Plaintiff's generic and erroneous assertions as to the similarity of the issues do not justify precluding Defendants from raising their distinct arguments. And "[w]here there is any doubt as

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to whether a specific issue was actually litigated, collateral estoppel is inappropriate." *Jose v. M/V Fir Grove*, 765 F. Supp. 1024, 1036 (D. Or. 1991).

For example, the Third Circuit decision cited by Plaintiff barely discussed the federal officer removal arguments advanced by Defendants here, instead focusing on the plaintiffs' disclaimers "that they are not suing over emissions caused by fuel provided to the federal government." *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 713 (3d Cir. 2022). But Plaintiff's Complaint contains no such disclaimer, and Plaintiff has not raised this as a "specific issue" in its Motion.[9] *Cf. Dow Chem. v. U.S. E.P.A.*, 832 F.2d 319, 323 (5th Cir. 1987) ("[O]nce an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted from its decision."). Several of the other decisions cited by Plaintiff did not involve Defendants' expansive evidentiary record supporting federal officer removal in this action, or the *Grable* issue raised by Defendants here. *See, e.g.*, *Connecticut v. Exxon Mobil Corp.*, 2021 WL 2389739, at *11–12 (D. Conn. June 2, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 44–47 (D. Mass. 2020).

Moreover, other circumstances of this case render the application of offensive nonmutual issue preclusion inappropriate. *First*, application of preclusion can be particularly unfair when a plaintiff "had the incentive to adopt a 'wait and see' attitude in the hope that the first action by another plaintiff would result in a favorable judgment." *Syverson*, 472 F.3d at 1079. In this matter, Plaintiff did not file suit until June 2023, *years* after other plaintiffs around the country had done so and had litigated jurisdictional issues, and two years after the "heat events" that are a focus of

[9] The Complaint asserts that Plaintiff "seeks no remedy under Federal law" and "does not seek relief with respect to any federal enclave." ECF No. 2-1, at 186 ¶ 17 This is not the same thing as disclaiming relief with respect to fuel supplied to the federal government.

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the Complaint. ECF No. 2-1, at 178 ¶ 1. Plaintiff's delay should not result in Defendants losing the ability to present their arguments.

Second, the issues for which Plaintiff seeks preclusion are "one[s] of law," and "treating [these issues] as conclusively determined would inappropriately foreclose opportunities for obtaining reconsideration of the legal rule upon which it was based." *Pharm. Care Mgmt. Ass'n v. District of Columbia*, 522 F.3d 443, 446–47 (D.C. Cir. 2008). To hold otherwise "would prevent the court from performing its function of developing the law." *Id*. at 447; *see also Montana v. United States*, 440 U.S. 147, 162 (1979); Restatement (Second) of Judgments § 29, cmt. i. The federal officer removal issue is one of law because it concerns the scope of the applicable legal rule governing the federal-officer-removal statute, while the *Grable* issue likewise presents a question of law as to the treatment of state-law tort claims targeting speech on matters of public concern. Accordingly, preclusion does not apply here.

Third, issue preclusion is particularly inappropriate in the removal context because federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). This Court thus has "a continuing, independent obligation to determine whether subject matter jurisdiction exists." *Mashiri v. Dep't of Educ.*, 724 F.3d 1028, 1031 (9th Cir. 2013).

Finally, the significant issues of national and global concern implicated in these cases weigh against the discretionary application of offensive nonmutual issue preclusion, and counsel firmly in favor of considering these issues on their merits.

Tellingly, Plaintiff does not cite any example from the climate change cases around the country—nor any other example—in which a court has resolved a question of jurisdiction on the

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grounds of issue preclusion. This Court should not take a unique approach here, but instead should resolve these arguments on their merits.

C. This Action Is Removable Because Plaintiff's Claims Are Necessarily And Exclusively Governed By Federal Law By Virtue Of Our Constitutional Structure.

Removal is also appropriate because Plaintiff's claims necessarily are governed exclusively by federal law under our federal constitutional system, and therefore arise under federal law. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *City of New York*, 993 F.3d 81; *see also* Pet. for Writ of Cert., *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, No. 21-1550, 2022 WL 2119473 (U.S. Jun 8, 2022).

That Plaintiff's claims arise under federal law is also shown by the original meaning of the statute conferring federal question jurisdiction, under which a case "arise[s] under" federal law based on the presence of a federal defense, in keeping with Article III's grant of "arising under" jurisdiction. *See, e.g.*, *Cohens*, 19 U.S. (6 Wheat.) at 379; 2 Cong. Rec. 4987 (1874) (Statement of Sen. Carpenter). The Supreme Court retreated from this view in *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894), but, as Justice Harlan pointed out in dissent, and more recent scholarship has affirmed, the Court's interpretation in *Planters' Bank* was "erroneous." *Id*. at 469 (Harlan, J., dissenting); *see also* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 Iowa L. Rev. 717, 734–56 (1986). The original meaning of the federal question removal statute confirms that removal on this ground is fully in line with the text and original meaning of 28 U.S.C. § 1331. Moreover, it also supports an exercise of federal jurisdiction under the *Grable* doctrine because Defendants' federal defenses present substantial and disputed issues that are "capable of resolution in federal court without disrupting the federal-state balance

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approved by Congress"—in fact, allowing these types of federal defenses to be heard in federal court was Congress' initial and actual intent.

Defendants recognize that this argument is foreclosed by Ninth Circuit precedent. *See San Mateo*, 32 F.4th at 748; *City of Oakland*, 969 F.3d at 904, 906. Defendants assert this ground for the sole purpose of preserving it for potential appellate review.

D. This Court Should Not Award Plaintiff Attorney's Fees.

Plaintiff's request for attorney's fees should be denied because Defendants raise numerous meritorious grounds for removal. "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). "[R]emoval is not objectively unreasonable solely because the removing party's arguments lack merit" and the removal is ultimately unsuccessful. *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065 (9th Cir. 2008) (affirming denial of request for attorneys' fees).

Defendants' removal here was more than objectively reasonable. As for diversity jurisdiction, Defendants have presented compelling arguments for removal that are unique to this case. *See supra* Section III.A. As for federal-question removal and federal officer removal, Defendants have presented compelling arguments for removal that have not been addressed by the Ninth Circuit, or any other federal Court of Appeals, in any other climate-change action. *See supra* Section III.B.

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IV. CONCLUSION

For the foregoing reasons, and those set forth in Defendants' Notice of Removal, this Court should deny Plaintiff's Motion to Remand. Defendants also respectfully request oral argument on Plaintiff's Motion.[10]

DATED: November 16, 2023.

[10] Plaintiff requests an expedited hearing without providing any basis for this request. There is no reason for this case to be heard on an expedited basis. Indeed, Plaintiff itself "d[id] not oppose" an extended briefing schedule, ECF No. 7, at 1 (Aug. 22, 2023), and waited until two years after the "heat events" that are a focus of the Complaint before bringing suit, *see* ECF No. 2-1, at 178 ¶ 1. The Court should deny the Plaintiff's request to expedite.

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