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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CITY OF OAKLAND, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Oakland City Attorney,

Plaintiff,

v.

BP P.L.C., *et al.*,

Defendants.

First Filed Case: 3:17-cv-06011-WHA
Related Case: 3:17-cv-06012-WHA

DEFENDANT CONOCOPHILLIPS' REPLY ON MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Case No. 3:17-cv-06011-WHA

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the San Francisco City Attorney DENNIS J. HERRERA, Plaintiff, v. BP P.L.C., *et al.*, Defendants.	Case No. 3:17-cv-06012-WHA Hearing Date: May 24, 2018 Time: 8:00 a.m. Location: Courtroom 12, 19th Floor The Honorable William H. Alsup

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Plaintiff argues that, because ConocoPhillips exercises "substantial control" over its subsidiaries by making business decisions and setting companywide policy, its direct and indirect subsidiaries are its agents and therefore their forum contacts can be attributed to ConocoPhillips.[1] But Plaintiff has not alleged any level of control over and above the general executive control incident to ConocoPhillips' status as a parent. Its allegations of control are contradicted by the Dodson Declaration; rely on unfounded speculation; have in many instances been rejected by California courts in prior cases; and fall short of making out a *prima facie* case for jurisdiction. The Court should dismiss the First Amended Complaints for lack of personal jurisdiction, without affording any opportunity for jurisdictional discovery.

I. THE COURT CANNOT EXERCISE SPECIFIC JURISDICTION OVER CONOCOPHILLIPS.

A. ConocoPhillips Does Not Have Minimum Contacts With California.

Plaintiff argues that the forum contacts of ConocoPhillips' direct and indirect subsidiaries must be attributed to it because ConocoPhillips "was and is the decisionmaker for its corporate family on fossil fuel production levels and managing climate change policies and risks." Opp. 1. But it is black letter law that the forum contacts of a subsidiary may not be attributed to a parent company solely on the basis of the corporate relationship. *See Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335 (1925). As the Ninth Circuit has explained, "a parent-subsidiary relationship alone is insufficient to attribute the contacts of the subsidiary to the parent for jurisdictional purposes." *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134 (9th Cir. 2003) (noting this "well-established" principle).

In addition to the allegations made in the First Amended Complaints, Oak. FAC ¶¶ 24, 52-54; SF FAC ¶¶ 24, 52-54, Plaintiff relies on Form 10-K filings that ConocoPhillips made with the Securities & Exchange Commission, as well as questionnaire responses provided to the Carbon Disclosure Project, to argue that ConocoPhillips "makes the business decision to produce fossil fuels," Opp. 1; "optimizes its oil and gas portfolio to fit its strategic plan," including

[1] By failing to oppose that portion of ConocoPhillips' motion, Plaintiff has waived any claim of general jurisdiction. *See Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005).

setting specific targets for revenues, Opp. 2; demonstrates control over its subsidiaries by using phrases such as "the Company," "we," "our," and "us" in its 10-K filings, statements that "in context, can only refer to parent functions," Opp. 2; and allocates to its board or a committee of the board "direct responsibility for climate change within the company," including development of a Climate Action Plan and factoring in carbon impacts into business decision making, Opp. 3.

1. ConocoPhillips Does Not Substantially Control Its Subsidiaries.

Even if these allegations are taken as true, they do not show that ConocoPhillips substantially controls its subsidiaries. "[U]nder any standard for finding an agency relationship, the parent company must have the right to *substantially control* its subsidiary's activities." *Williams v. Yamaha Motor Corp., Ltd.*, 851 F.3d 1015, 1024–25 (9th Cir. 2017) (emphasis added).[2] But "some degree of control is an ordinary and necessary incident of the parent's ownership of the subsidiary." *Virtualmagic Asia, Inc. v. Fil-Cartoons, Inc.*, 99 Cal. App. 4th 228, 245 (2002). A plaintiff alleging that a subsidiary is an agent of its corporate parent must thus show a level of control that "reflect[s] the parent's purposeful disregard of the subsidiary's independent corporate existence." *Sonora Diamond Corp. v. Super. Ct.*, 83 Cal. App. 4th 523, 542 (2000). "The parent's general executive control over the subsidiary is not enough; rather there must be a strong showing beyond simply facts evidencing 'the broad oversight typically indicated by [the] common ownership and common directorship' present in a normal parent-subsidiary relationship." *In re Packaged Seafood Prods. Antitrust Litig.*, 242 F. Supp. 3d 1033, 1063 (S.D. Cal. 2017) (quoting *Sonora Diamond*, *supra*); *see also DVI, Inc. v. Super. Ct.*, 104 Cal. App. 4th 1080, 1094 (2002) (same). Because the standard for showing control is so stringent, "[i]t is the 'rare occasion' where a court is willing to treat a parent and subsidiary as

[2] The Supreme Court's decision in *Daimler AG v. Bauman* was hardly a full-throated endorsement of the use of agency analysis for specific jurisdiction. *See* 571 U.S. 117, 135 n.13 (2014) ("Agency relationships, we have recognized, *may* be relevant to the existence of specific jurisdiction.") (emphasis added). The Ninth Circuit, in turn, simply "[a]ssum[ed]" that "some standard of agency continues to be 'relevant to the existence of *specific* jurisdiction.'" *Williams*, 851 F.3d at 1023–24. ConocoPhillips explicitly preserves the question whether agency remains a viable theory of specific jurisdiction under *Daimler* and its progeny.

one entity for jurisdictional purposes." *F. Hoffman-La Roche, Inc. v. Super. Ct.*, 130 Cal. App. 4th 782, 797 (2005) (quoting *Calvert v. Huckins*, 875 F. Supp. 674, 678 (E.D. Cal. 1995)).

Attributes that courts have *rejected* as evidence of substantial control include:

- Overlaps in board membership, including overlap in the membership of committees charged with "operational management . . . and for implementing" the parent's decisions, *BBA Aviation PLC v. Super. Ct.*, 190 Cal. App. 4th 421, 433 (2010);
- Capitalization of the subsidiary by the parent, so long as the parent "maintain[s] the corporate formalities by properly documenting its loans and capital contributions," *Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir. 2001), *overruled in non-relevant part by Williams*, 851 F.3d at 1024;
- The use of the word "we" in annual reports or filings required under federal law to describe the parent and its subsidiaries, *see BBA Aviation*, 190 Cal. App. 4th at 432 ("[T]he use of 'we' or 'the Company' or 'BBA' does not prove that BBA and [its subsidiary] Ontic were a single entity in practice and does not turn a holding company into an operating company."); *see also DVI, Inc.*, 104 Cal. App. 4th at 1095.
- The use of the word "portfolio" to describe a parent's suite of subsidiaries, *see BBA Aviation*, 190 Cal. App. 4th at 432 (noting that "references to [a parent's] subsidiaries as a 'portfolio'" actually suggests "a passive role in operations");
- Influence by the parent over hiring and firing, *see Sammons Enters., Inc. v. Super. Ct.*, 205 Cal. App. 3d 1427, 1430 (1988); and
- Use of the parent's logos, *see BBA Aviation*, 190 Cal. App. 4th at 434–35.

Most importantly, a parent setting companywide policy is not evidence of substantial control. It is "unremarkable" that a parent would have a "measurable degree of influence over its subsidiary." *In re Packaged Seafood*, 242 F. Supp. 3d at 1064. It is equally unremarkable that the parent's board, or a committee thereof, would oversee "operational management" and be responsible "for implementing" the parent board's decisions. *BBA Aviation*, 190 Cal. App. 4th at 433. To establish substantial control, "the parent must be shown to have moved beyond the establishment of general policy and direction for the subsidiary and in effect taken over

performance of the subsidiary's *day-to-day* operations in carrying out that policy." *Sonora Diamond*, 83 Cal. App. 4th at 542 (original italics).

Under this stringent standard, Plaintiff's allegations of control fall woefully short, even if they could be fully proved. Plaintiff's reliance on the use of "we" and other collective words in the ConocoPhillips 10-K has been repeatedly rejected by California courts as a basis for asserting specific jurisdiction over the parent. *See BBA Aviation*, 190 Cal. App. 4th at 432; *DVI*, 104 Cal. App. 4th at 1095. The fact that the parent's board determines "development plans" for the company and its subsidiaries, sets financial goals for optimization of assets, settles on climate change policy, and determines how to factor climate change impacts into business decisions is "unremarkable" and indicates nothing more than the fact that ConocoPhillips is the parent. *In re Packaged Seafood*, 242 F. Supp. 3d at 1064. Plaintiff has not alleged in its First Amended Complaint, or offered even a scintilla of evidence in its opposition—to say nothing of making the requisite "strong showing," *id.* at 1063—that ConocoPhillips' control of its subsidiaries is "pervasive and continual" or that the parent has "in effect taken over performance of the subsidiary's *day-to-day* operations in carrying . . . polic[ies]" set by the board. *Sonora Diamond*, 83 Cal. App. 4th at 542 (original italics). In fact, the uncontradicted facts of the Dodson Declaration demonstrate the care that ConocoPhillips takes to respect corporate formalities vis-à-vis its subsidiaries, direct and indirect. Dodson Decl. ¶ 15 ("ConocoPhillips follows all corporate formalities and respects the corporate separateness of its direct and indirect subsidiaries" and "those indirect subsidiaries that are allowed and/or required to have officers, have their own officer structures and their own governance structures that appoint their officers."); *id.* ¶ 14 (subsidiaries are "separately capitalized from ConocoPhillips" and "ConocoPhillips Company has its own assets, cash flows, and income" and "maintains separate bank accounts"). These averments are uncontradicted and must be credited by the Court. *See Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1284–86 (9th Cir. 1977). Taken together, they belie any argument that ConocoPhillips substantially controls its subsidiaries.

The fallacy of Plaintiff's "control" argument is apparent when one considers the converse: what parent company *wouldn't* be liable for its subsidiaries' forum contacts under

Plaintiff's theory? The reality is that Plaintiff's jurisdictional theory "stacks the deck, for it will always yield a pro-jurisdiction answer." *Daimler*, 571 U.S. at 136. For these reasons, it must be rejected and ConocoPhillips' motion to dismiss granted.

2. ConocoPhillips Has No Direct Activities In California.

Plaintiff also alleges "[u]pon information and belief" that ConocoPhillips entered into supply contracts "with operators of Conoco-branded retail stations in California, and/or distributors, which, among other things, required these operators to sell only gasoline with Conoco proprietary additives, and for supply of certain volumes of such gasoline to Conoco-branded stations." Oak. FAC ¶ 55; SF FAC ¶ 55. This is the only allegation in the First Amended Complaints that ConocoPhillips itself (as opposed to its subsidiaries) took action in California. In its opposition, Plaintiff expands on this allegation, pointing to a federal lawsuit in the Eastern District of New York in which ConocoPhillips supposedly "licensed the 'Exxon' trademark in New York" and, as part of that agreement, "required delivery of minimum volumes of proprietary gasoline." Opp. 4 (citing *ConocoPhillips v. 261 E. Merrick Rd. Corp.*, 428 F. Supp. 2d 111, 126 & n.1 (E.D.N.Y. 2006)). Plaintiff argues that "it is reasonable to assume that Conoco[Phillips] has used the same practice for its own brands" in California. Opp. 5.

This allegation cannot be credited by the Court, as it is directly contradicted by the Dodson Declaration. *See* Dodson Decl. ¶ 8; *see also Data Disc*, 557 F.2d at 1286 (court cannot credit jurisdictional allegations directly contradicted by affidavit). Even on its face, this allegation amounts to nothing more than speculation about what ConocoPhillips must have done in California based on alleged conduct occurring in New York under a different set of contracts. Such speculation is not a proper basis for finding jurisdiction. *See Smith v. Brinker Int'l, Inc.*, No. C 10-0213 VRW, 2010 WL 1838726, at *3 (N.D. Cal. May 5, 2010) ("The court may not base its jurisdiction on speculation and conjecture.").

In any event, Plaintiff is wrong about the New York contracts that supposedly give rise to an inference of conduct in California. In *261 E. Merrick Rd. Corp.*, a New York gas station owner "entered into three separate but related agreements (collectively, the 'Contract Dealer Account Agreements' or 'CDA Agreements') with Exxon Company, U.S.A. (a division of

Exxon Corporation[)]" in 1996. 428 F. Supp. 2d at 114. Under those agreements, the station owner was required "to sell only Exxon-branded gasoline and petroleum products for a period of ten years," through 2006. *Id.* During the course of this agreement, on December 1, 1999, "Tosco Corporation . . . acquired Exxon's retail marketing assets in New York and elsewhere, including the CDA Agreements." *Id.* at 117 n.1. Tosco was acquired by Phillips Petroleum Company in 2001, which later became ConocoPhillips Company, a wholly-owned direct subsidiary of ConocoPhillips. In 2003, Tosco merged with ConocoPhillips Company, leaving ConocoPhillips Company as the surviving entity. Dodson Decl. ¶ 17; *see also 261 E. Merrick Rd. Corp.*, 428 F. Supp. 2d at 117 n.1. "Neither Tosco Corporation nor any of its successors-in-interest ever merged or otherwise consolidated with ConocoPhillips." Dodson Decl. ¶ 17. Given this history, it is not *at all* "reasonable to assume that Conoco[Phillips] has used the same practice for its own brands," as Plaintiff theorizes. Opp. 5. Plaintiff cannot transform this *sui generis* case—involving another brand of gasoline sold in another State pursuant to another company's sales agreement—into evidence of what ConocoPhillips *might* be doing in California.

Because ConocoPhillips has no activities at all in California, this Court's exercise of jurisdiction over it is not consistent with due process, and its motion to dismiss must be granted.

B. Plaintiff's Claims Do Not Arise From ConocoPhillips' Conduct In California.

Even if the Court credits Plaintiff's "substantial control" allegations and attributes its subsidiaries' activities to ConocoPhillips, the Court still would not have jurisdiction over Defendant. This is because Plaintiff has not adequately alleged that its claims "arise out of or relate to the defendant's contacts with the forum." *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty.*, 137 S. Ct. 1773, 1780 (2017) (alterations accepted) (quoting *Daimler*, 571 U.S. at 127).

Plaintiff claims that ConocoPhillips argues that the Ninth Circuit's "but-for" test for determining whether a claim arises out of a defendant's forum contacts is not satisfied, because its subsidiaries' "fossil fuel activities in California did not by themselves cause all of the Cities' injuries." Opp. 9. Not so. The salient question is whether the alleged in-state conduct was a "necessary" cause of the injury, *Unocal Corp.*, 248 F.3d at 925, or merely an "attenuated" or

"isolated" activity within the forum state with little connection to the alleged injury, *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068, 1070 (9th Cir. 2017). This inquiry assumes that there can be some in-state activity that is nonetheless too minimal or presents too attenuated a connection to the alleged injury to support specific jurisdiction. *See Doe v. Am. Nat'l Red Cross*, 112 F.3d 1048, 1051 (9th Cir. 1997) (no jurisdiction if in-state conduct has only an "attenuated" or "peripheral" relationship to the claims). Plaintiff, who bears the burden on jurisdiction, has not adequately pleaded any facts showing that ConocoPhillips' subsidiaries' in-state activities (many of them that occurred in the past, by Plaintiff's admission, *see* Oak. FAC ¶¶ 53-55; SF FAC ¶¶ 53-55), were the necessary cause of Plaintiff's alleged injury, rather than attenuated, isolated, or peripheral acts with little connection to the alleged nuisance.

There is also no connection between California and the conduct Plaintiff alleges actually caused the alleged nuisance. The gravamen of Plaintiff's claims is that Defendants allegedly misled the public and regulators by promoting continued use of fossil fuels in the face of their actual knowledge that this use would cause sea-level rise and attendant injuries. Oak. FAC ¶¶ 104-16, 147; SF FAC ¶¶ 104-16, 147. But even if true, none of this alleged policy- and decision-making or opinion-shaping conduct, so central to Plaintiff's substantive claims *and* its jurisdictional averments, occurred *in California*. If ConocoPhillips exercises substantial control over its subsidiaries, as Plaintiff alleges, as a simple matter of common sense that control was exercised from the company's headquarters in Texas. *See, e.g., Commc'ns Network Billing, Inc. v. ILD Telecomms., Inc.*, No. CV 17-10260, 2017 WL 3499869, at *4–5 (E.D. Mich. Aug. 16, 2017) (granting motion to dismiss because "the critical question is where [d]efendant allegedly made the decision to withhold [plaintiff]'s payments," which would have occurred outside of the forum); *Buelow v. Plaza Motors of Brooklyn, Inc.*, No. 2:16-cv-02592-KJM-AC, 2017 WL 2813179, at *4 (E.D. Cal. June 29, 2017) (granting motion to dismiss where all alleged wrongdoing occurred in New York, and none of the "defendant's suit-related conduct" was connected to California). Under Plaintiff's theory, *all* of the conduct that allegedly brought about its injury—not just some unquantified and indeterminate fraction of the whole—has its root in decisions made in Texas, the forum where ConocoPhillips operates.

C. The Exercise of Jurisdiction Over ConocoPhillips Is Unreasonable.

As recited in ConocoPhillips' motion, "[t]he law of personal jurisdiction is asymmetrical and is primarily concerned with the defendant's burden." *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 561 (9th Cir. 1995). As set forth in the Dodson Declaration, ConocoPhillips has no offices, personnel, facilities, or other ties to this forum, and it has no books and records located in this forum. Dodson Decl. ¶¶ 9-12. Plaintiff does not dispute any of these statements.

II. PLAINTIFF IS NOT ENTITLED TO JURISDICTIONAL DISCOVERY.

Plaintiff's request for jurisdictional discovery should be denied. Plaintiff seeks jurisdictional discovery on "Conoco[Phillips'] role as the ultimate decisionmaker with respect to levels of companywide production of fossil fuels, including taking into account climate change, and its decisions to have its subsidiaries . . . carry out that decision." Opp. 14. But as demonstrated above, serving as the decision maker and seeing to the implementation of the parent board's decisions is not evidence that a parent company substantially controls its subsidiaries. *Supra* at § I.A. This influence is no more than a "necessary incident" of the parent-subsidiary relationship. *Virtualmagic Asia*, 99 Cal. App. 4th at 245.

Plaintiff has not alleged a single contested fact, or even identified a potential inference, that if true might tend to show that ConocoPhillips exercises substantial control over its subsidiaries. Under these circumstances, "[a]dditional jurisdictional discovery would be futile." *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1071 (9th Cir. 2014); *see also Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006) (jurisdictional discovery not warranted where "a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants").

CONCLUSION

Considering the foregoing, the Court cannot exercise personal jurisdiction over Defendant ConocoPhillips, and its motion to dismiss should be granted.

Dated: May 10, 2018

Respectfully submitted,

By: /s/ *George Morris*

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on May 10, 2018, I caused the foregoing to be filed with the Clerk of the Court via CM/ECF. Notice of this filing will be sent by email to all counsel of record by operation of the Court's electronic filing systems.

By: /s/ *George Morris*
George Morris