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March 2, 2018

Honorable John F. Keenan
Southern District of New York
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: *City of New York v. BP P.L.C., et al.*, Case No. 18-cv-182-JFK (S.D.N.Y.)

Dear Judge Keenan:

Counsel for Plaintiff City of New York (“Plaintiff”) and Defendants Chevron Corporation (“Chevron”), BP p.l.c. (“BP”), ConocoPhillips (“ConocoPhillips”), Exxon Mobil Corporation (“Exxon”), and Royal Dutch Shell plc (“RDS”) (collectively, the “Defendants”) have conferred concerning the briefing schedule for motions to dismiss in this matter. For the reasons set forth below, Chevron and Plaintiff respectfully make this unopposed joint request that the Court enter the proposed scheduling order submitted simultaneously with this letter (Attachment A).

As an initial matter, the Court previously entered a scheduling order on February 6, 2018 negotiated between Plaintiff and the three Defendants that had previously been served in this matter (Chevron, ConocoPhillips, and Exxon) (collectively, the “U.S.-based Defendants”), addressing motions to dismiss by these three Defendants. (Dkt. 28). That order provided that the U.S.-based Defendants would serve their motions to dismiss on February 23, 2018, including a “single brief addressing commonly applicable issues under Rules 12(b)(1) and 12(b)(6)” of the Federal Rules of Civil Procedure, as well as any “individual motions to dismiss under individual Rule 12 grounds” (including any individual motions to dismiss based on lack of jurisdiction under Rule 12(b)(2)). *See* Dkt. 28 at 1–2 (capitalization altered). The order further provided that the opposition to the joint brief under Rule 12(b)(1) and 12(b)(6) would be served on March 30, 2018, and the reply on April 6, 2018, while any opposition to the U.S.-based Defendants’ separate motions (including separate motions objecting to personal jurisdiction under Rule 12(b)(2)) would be served on April 6, 2018, and replies on April 13, 2018. By joint letter filed on February 14, 2018, the Plaintiff and the U.S.-based Defendants further requested that the Court set a hearing date for these motions on April 18, 2018.

Since the entry of the Court’s February 6, 2018 scheduling order, two developments have occurred that Chevron and Plaintiff submit warrant a modification of the schedule for motions to dismiss.

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First, Chevron has only moved to dismiss on Rule 12(b)(1) and 12(b)(6) grounds, and has not sought dismissal of Plaintiff's Complaint for lack of personal jurisdiction under Rule 12(b)(2), while Defendants ConocoPhillips and Exxon have also sought dismissal for lack of personal jurisdiction under Rule 12(b)(2). While ordinarily, a Court will decide objections to personal jurisdiction before reaching a merits issue, *see In re Rationis Enterprises, Inc. of Panama*, 261 F.3d 264, 267-68 (2d Cir. 2001), because Chevron moved to dismiss only under Rules 12(b)(1) and 12(b)(6), the Court will have to decide one or more of the issues raised under those Rules in order to resolve the pending motions to dismiss. The Court's determination of the Rule 12(b)(1) and 12(b)(6) motions could render Plaintiff's claims non-viable as to all Defendants.

Under these circumstances, Chevron and Plaintiff respectfully submit that the interests of judicial economy and efficiency may be best served through the resolution of the Rule 12(b)(1) and 12(b)(6) issues that have been raised in the pending motions, which could obviate the need to resolve the remaining U.S.-based Defendants' objections to personal jurisdiction, which may inevitably turn in part upon Defendant-specific facts and circumstances. *See, e.g., Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 n.17 (2d Cir. 2012) ("Ordinarily, we would address any challenge to personal jurisdiction prior to deciding the merits of the cause of action. . . . However, in cases such as this one with multiple defendants—over some of whom the court indisputably has personal jurisdiction—in which all defendants collectively challenge the legal sufficiency of the plaintiff's cause of action, we may address first the facial challenge to the underlying cause of action and, if we dismiss the claim in its entirety, decline to address the personal jurisdictional claims made by some defendants. This is particularly true when the personal jurisdictional challenges are based on factual allegations that are, in this early posture, still under development. . . . This approach does not violate the Supreme Court's repudiation of the so-called 'hypothetical jurisdiction' doctrine, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998), as our analysis is based on the undisputed personal jurisdiction of the other defendants.").

Second, BP and RDS (collectively, the "foreign-based Defendants") have now each purportedly been served and their respective counsel have conferred with counsel for Plaintiff as to an appropriate schedule for motions to dismiss. Both BP and RDS intend to seek dismissal of the Complaint for lack of personal jurisdiction under Rule 12(b)(2), lack of Article III jurisdiction under Rule 12(b)(1), failure to state a claim under Rule 12(b)(6), and potentially also for insufficient service of process under Rule 12(b)(5). BP and RDS submit that, as foreign-based Defendants, their personal jurisdiction motions present different issues, both legally and factually, than the personal jurisdiction motions of the U.S.-based Defendants and may require a lengthier briefing schedule for both sides. In the present posture of the case, the interests of judicial efficiency and economy may be best served by deferring briefing on motions to dismiss by the foreign-based Defendants, which would raise

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distinct personal jurisdiction issues and potentially redundant issues under Rules 12(b)(1) and 12(b)(6).

In view of these developments, Chevron and Plaintiff jointly request that any further briefing on the personal jurisdiction motions filed by ConocoPhillips and Exxon and any briefing on the foreign-based Defendants' motions to dismiss be deferred until after the Court's ruling on the U.S.-based Defendants' motions raising Rules 12(b)(1) and 12(b)(6) issues. ConocoPhillips, Exxon, BP, and RDS do not object to this request. Chevron and Plaintiff further respectfully request that the Court proceed to resolve the pending motions to dismiss of the U.S.-based Defendants under Rules 12(b)(1) and 12(b)(6), and that in doing so, the Court consider the issues raised in the joint brief and the Rule 12(b)(6) issues raised in the brief filed by ConocoPhillips.

Accordingly, Chevron and Plaintiff respectfully request that the Court enter the revised proposed scheduling order attached hereto, which provides as follows:

The following deadlines shall apply to Defendants Chevron, ConocoPhillips, and Exxon's motions to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure:

- (a) On or before March 30, 2018, the date already set by the Court's February 6, 2018 Order, Plaintiff shall serve its response to the "Memorandum of Law of Chevron Corporation, ConocoPhillips, and Exxon Mobil Corporation Addressing Common Grounds in Support of Their Motions to Dismiss."
- (b) On or before April 6, 2018, the date already set by the Court's February 6, 2018 Order, Plaintiff shall serve its response to the "Memorandum of Law in Support of ConocoPhillips' Motion to Dismiss" insofar as it addresses individual 12(b)(6) issues (*i.e.*, "Point I" of that Memorandum).
- (c) Pending further order of the Court, any further briefing on the personal jurisdiction issues raised by ConocoPhillips and Exxon will be deferred, and Plaintiff therefore need not serve a response to those issues at this time, however, Exxon and ConocoPhillips shall electronically file their opening briefs on these issues on April 6, 2018 and April 13, 2018, respectively;
- (d) On or before April 6, 2018, the date already set by the Court's February 6, 2018 Order, the U.S.-based Defendants shall serve their reply brief in support of the "Memorandum of Law of Chevron Corporation, ConocoPhillips, and Exxon Mobil Corporation Addressing Common Grounds in Support of Their Motions to Dismiss."

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- (e) On or before April 13, 2018, the date already set by the Court's February 6, 2018 Order, ConocoPhillips will serve its reply brief in support of its "Memorandum of Law in Support of ConocoPhillips' Motion to Dismiss" insofar as it addresses individual 12(b)(6) issues (*i.e.*, "Point I" of that Memorandum).
- (f) As requested in the Plaintiff's and the U.S.-based Defendants' joint letter to the Court dated February 14, 2018, the Court will hear argument on the U.S.-based Defendants' motions to dismiss on 12(b)(1) and 12(b)(6) grounds on April 18 (or as soon thereafter as the Court is available).

Chevron and Plaintiff further propose that within ten (10) days of the Court's ruling on the U.S.-based Defendants' motions to dismiss on 12(b)(1) and 12(b)(6) grounds, Plaintiff and the U.S.-based Defendants will submit their joint or separate proposals as to how to proceed with respect to the personal jurisdiction objections raised by ConocoPhillips and Exxon (*e.g.*, whether resolution of those objections is necessary at that time in light of the Court's ruling, and if so, how to proceed in briefing and resolving those issues).

Chevron and Plaintiff further propose that within ten (10) days of the Court's ruling on the U.S.-based Defendants' motions to dismiss on 12(b)(1) and 12(b)(6) grounds, Plaintiff and the foreign-based Defendants shall submit their joint or separate proposals as to how to proceed with respect to the foreign-based Defendants (*e.g.*, whether the filing of motions to dismiss is warranted at that time in light of the Court's ruling, and if so, how to proceed in briefing and resolving those issues).

The parties agree, and request that the Court order, that this request and any order entered pursuant thereto shall not effect a waiver of any defense under Rule 12(b)(2) of the Federal Rules of Civil Procedure, and ConocoPhillips and Exxon do not waive their objections to personal jurisdiction; on the contrary, they expressly preserve those objections as reflected in their respective motions served on February 23, 2018 in accordance with this Court's February 6, 2018 scheduling order. Moreover, the parties agree and request that the Court order that this request and any order entered pursuant thereto, and any deferral by the Court of the responses of the foreign-based Defendants to the Complaint until after the Court's ruling on the U.S.-based Defendants' motions to dismiss under Rules 12(b)(1) and 12(b)(6), shall not effect a waiver of any of the foreign-based Defendants' objections to the Complaint, including lack of personal jurisdiction or insufficient service of process. The foreign-based Defendants do not waive any of their objections to the Complaint, including lack of personal jurisdiction and insufficient service of process; on the contrary, they expressly preserve all objections to the Complaint.

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Respectfully submitted,

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¹ The parties use electronic signatures with consent in accordance with Rule 8.5(b) of the Court's ECF Rules and Instructions.

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