UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF NEW YORK, Plaintiff, v. BP P.L.C.; CHEVRON CORPORATION; CONOCOPHILLIPS; EXXON MOBIL CORPORATION; and ROYAL DUTCH SHELL PLC, Defendants.	Case No. 18 Civ. 182 (JFK)

CONOCOPHILLIPS' REPLY MEMORANDUM OF LAW ADDRESSING INDIVIDUAL ISSUES IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Back in 2004, when the City brought its failed global-warming nuisance suit against major greenhouse gas emitters (five power companies), the City of course knew that the present defendants produced oil and gas, and that the burning of those fuels by end users contributed to global warming. Fourteen years later, the City now contends that by reaching *further back* in the causal chain, and suing the indirect suppliers of the emitters instead of the emitters themselves, it has stated a global-warming nuisance claim.

Hardly. As the City of Kivalina found out, such claims against oil and gas companies are required to be dismissed too. Open. Br. 2. The City of New York fares no better.

The City insists that its present lawsuit is predicated "upon the fundamental principle that a corporation that makes a product causing severe harm when used exactly as intended should shoulder the costs of abating that harm." Am. Complt. ¶ 1; *see also* NYC Opp. Com. Br. 1 (same). But no such principle of law exists. Rather, as Judge Easterbrook explained in rejecting the same argument made against the tobacco companies, there is "no rule of law [that] requires persons whose acts cause harm to cover all of the costs, *unless these acts were legal wrongs*." *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Tr. Fund* v. *Philip Morris Inc.*, 196 F.3d 818, 823 (7th Cir. 1999) (emphasis added). That is why, as Judge Easterbrook further explained, even though "[t]he food industry puts refined sugar in many products," foreseeably resulting in "health problems and early death," plaintiffs cannot "recover in tort from Godiva." *Id*. Closer to home, as the First Department put it in *Sturm Ruger*, were the law otherwise, "[a]ll a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its nondefective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born." *People ex rel. Spitzer* v. *Sturm, Ruger & Co.*, 309 A.D.2d 91, 96 (1st Dep't 2003).

As shown in the Common Brief, numerous grounds compel dismissal. But ConocoPhillips submitted its additional brief (referenced by the Common Brief at p. 29) because nothing the City alleged that *ConocoPhillips* did was the proximate cause of its injury. For all the City's bluster

about misleading the public, the complaint — even as amended — alleged but *two* statements made by ConocoPhillips or its subsidiaries (one about the future of Canadian tar sands; the other about responsibly powering modern life, Open. Br. 3, 9), neither of which could have misled anyone about global warming. To the precise contrary, ConocoPhillips has made clear on its website for *fifteen years* that "the burning of fossil fuels[] is contributing to increased concentrations of greenhouse gases in the atmosphere that can lead to adverse changes in global climate." Ex. 2.[1]

Tellingly, the City buries its response to this patent deficiency of its case in a footnote (13 n.9), in which it says that the 2003 website statement was followed by an acknowledgement that "debate continues over the extent of human contributions." Ex. 2. But precisely because such debate was indeed taking place in 2003, there is (and can be) no claim that this was false. More fundamentally, in the same sentence quoted by the City, ConocoPhillips made clear *its own* view on the matter: despite that continuing "debate," ConocoPhillips was taking steps "to address greenhouse gas emissions." *Id.*

It is no answer that the American Petroleum Institute ("API") (or any other group) may have expressed arguably different viewpoints at different times. As a threshold matter, as the eight unanimous federal circuit tobacco decisions make clear, allegations of "misleading the public" — even when done by the defendant itself — do not overcome lack of proximate cause. Open. Br. 9. But more fundamentally as to ConocoPhillips: The API (as documents cited by the City reflect, *see* Ex. A at 1) has over *400* members. As then-Judge Alito explained in granting *mandamus* against a district court that had ruled that a defendant could be liable for statements by a trade group to which it belonged that allegedly misled the public about asbestos, "[a] member of a trade group or other similar organization does not necessarily endorse everything done by that organization or its members." *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1290 (3d Cir. 1994). Rather, as required by the Supreme Court, "[f]or liability to be imposed by reason of association,"

[1] The numbered exhibits cited herein were contained in the Declaration of Jonathan Siegel submitted with the opening brief. The lettered exhibit is contained in the Reply Declaration.

it is "necessary" that "the group itself possessed unlawful goals *and that the individual held a specific intent to further those illegal aims*." *Id.* at 1289 (emphasis in original) (quoting *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982)); *accord Taylor* v. *Airco, Inc.*, 503 F. Supp. 2d 432, 446 (D. Mass. 2007) (membership and participation in trade group insufficient to make defendant responsible for trade group's statements understating risks of chemical), *aff'd*, 576 F.3d 16 (1st Cir. 2009).

There is no allegation that ConocoPhillips specifically intended to further any scheme to mislead the public. Nor could there be: To the contrary, ConocoPhillips *itself* has made clear on *its own* website for fifteen years that the burning of fossil fuels *is* contributing to global warming. Under *Iqbal* and *Twombly*, it is utterly implausible that a party specifically intended to further an alleged scheme to mislead the public when the *party itself* publicly stated the truth. *A fortiori* does the City's complaint fail since the even stricter Rule 9(b) standard applies to allegations sounding in fraud.

ARGUMENT

I. Plaintiff's claims against ConocoPhillips are barred by well-settled common law principles of proximate cause.

Producing oil and gas is not a tort. And as shown (Open. Br. Point I), under well-settled principles of proximate cause, any connection between that (lawful) activity and the City's claimed harm is far too indirect and remote. This is evident from the First Department's decision rejecting analogous claims against the gun industry, and the eight unanimous federal circuit tobacco decisions (upon which the First Department relied). Indeed, as shown (Open. Br. 7-8), the causal chain here is even more attenuated than in those cases. The City has no cogent response:

1. *The City's attempt to avoid Sturm Ruger fails*. The City asserts (at 10) that "the court never said direct and immediate harm was required." To the contrary, *Sturm Ruger* stated it was following the Court of Appeals' "longstanding posture of denying liability where the causal connection between the alleged business conduct and harm is too tenuous and remote." *Sturm Ruger*, 309 A.D.2d at 95 (citing *Hamilton* v. *Beretta USA Corp.*, 96 N.Y.2d 222 (2001)). It made

clear: "the harm plaintiff alleges is far too remote from defendants' otherwise lawful commercial activity to fairly hold defendants accountable for common law public nuisance." *Id.* at 103.

The City cites (at 10) the Court's statement that it was not saying "a common-law public nuisance claims is *always* an inappropriate legal tool to address consequential harm from all forms of commercial activity." *Id.* at 97 (emphasis added). But it ignores the example the Court gave as to when such a claim is proper: blasting at a neighboring property that, "wholly unlike the business practices alleged here, was the *direct and immediate cause* of the damages to others nearby." *Id*. (emphasis in original). The First Department also found "misplaced" the plaintiff's reliance on the same cases the City attempts to rely on here — *City of Rochester* v. *Premises Located at 10-12 S. Wash. St.*, 180 Misc. 2d 17 (Monroe Cty. 1998) (nightclub attracting drunken brawlers); *State* v. *Fermenta ASC Corp.*, 238 A.D.2d 400 (2d Dep't 1997) (chemical producer told user to apply product contaminating soil); and *State* v. *Schenectady Chems., Inc.*, 117 Misc. 2d 960 (Rensselaer Cty. 1983) (chemical manufacturer contracted with third party to dump waste), *modified*, 103 A.D.2d 33 (3d Dep't 1984). As the First Department itself explained, liability was found in *City of Rochester* because serving alcohol to the drunken crowd was the "*immediate and direct cause*" of the harm, given the "spatial proximity to defendant's premises and [the] temporal proximity to its commercial activity." *Sturm Ruger*, 309 A.D.2d at 97-98 (emphasis added). And *Fermenta* and *Schenectady* were not in point because they "involve[d] specific harm *directly* attributable to defendant or defendant's activity." *Id*. at 98 n.2 (emphasis added).[2]

The City's attempt (at 10-11) to distinguish *Sturm Ruger* because one element of the causal chain involved criminal activity is unavailing. The Court in no way suggested that its holding was so limited. Rather, the Court made clear that the claims were required to be dismissed not only because there was a criminal act in the chain, but also because the harm alleged was "far too

[2] The other cases cited by the City likewise involved direct and immediate injury. *See Boomer* v. *Atl. Cement*, 26 N.Y.2d 219 (1970) (smoke and vibration at plant injured neighbors' property); *Clawson* v. *Cent. Hudson Gas & Elec. Corp.*, 298 N.Y. 291 (1948) (dam sprayed water onto bridge causing icy conditions); *Shaw's Jewelry Shop, Inc*. v. *N.Y. Herald Co.*, 170 A.D. 504 (1st Dep't 1915) (huge crowd harming neighboring store).

remote from defendants' otherwise lawful commercial activity." *Id.* at 103. In so holding, the Court relied upon the eight federal circuit tobacco decisions — where there was no intervening criminal act. *Id.* at 103 n.3; *see also id*. at 97 (distinguishing *New York Trap Rock* because "there was no subsequent, intervening criminal *or other* act or event" (emphasis added)). And when the Court made clear that its proximate cause ruling was necessary to avoid a "flood" of similar nuisance suits against a "wide and varied array" of "manufacturing enterprises," it of course did not mean only those (few) industries producing items commonly used in crimes. *Id.* at 96.

2. *The City's attempt to avoid the eight federal circuit tobacco decisions fails*. The City claims (at 2) that these cases were dismissed due to a "'wrong plaintiff' defect," since they were brought by "union pension fund[s]." Not so. The cases were brought not only by union funds, but also by state political subdivisions,[3] and even sovereign nations.[4] As the decisions make clear, the basis for dismissal was not "wrong plaintiff"; it was lack of proximate cause. Open. Br. 6-7.

The City also attempts to distinguish the tobacco decisions as involving only "*derivative* financial loss as a result of an injury to third-party smokers." NYC Br. 11 (emphasis in original). Again, not so. Many of the cases also alleged *non*-derivative harm to plaintiffs themselves — and those claims were likewise found to lack proximate cause. Judge Becker's decision for the Third Circuit — relied upon in *Sturm Ruger*, where there also was no derivative injury — is illustrative. Noting the plaintiff's non-derivative "direct injury," the Court stated that the "directness of the [plaintiff's] alleged injury" was not "dispositive," and that the Court needed instead to "focus on proximate cause in general and on remoteness in particular." *Steamfitters Local Union No. 420 Welfare Fund* v. *Philip Morris, Inc.*, 171 F.3d 912, 920-21 (3d Cir. 1999). The Court held that the

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[3] *See Ass'n of Wash. Pub. Hosp. Dists.* v. *Philip Morris Inc.*, 241 F.3d 696, 707 (9th Cir 2001) (dismissing case brought by state political subdivisions, including nuisance claims, for lack of proximate cause, which requires "a cause which, *in a direct sequence unbroken by any new independent cause*, produces the injury complained of").

[4] *See Serv. Emps. Int'l Union Health & Welfare Fund* v. *Philip Morris Inc.*, 249 F.3d 1068, 1071-74 (D.C. Cir. 2001) (consolidated opinion directing dismissal of complaints brought by three nations, as well as union fund complaint, because the "'tortured path' from the defendants' alleged wrongdoing to the nation's increased expenditures" did not satisfy "proximate cause").

proximate cause bar applied fully to plaintiffs' non-derivative injury, due to the "sheer number of links in the chain of causation" and the "tortured path" between defendants' conduct and plaintiff's injury, demonstrating that these were "precisely the type of indirect claims that the proximate cause requirement is intended to weed out." *Id.* at 930. As shown (Open. Br. 7-8), the causal chain here is even more indirect than the tobacco cases, involving innumerable third-party decisions between the (lawful) production of oil and the City's claimed injuries. Tellingly, the City does not even *attempt* to grapple with that causal chain, or the actual holdings of the tobacco cases.

As also shown (Open. Br. 9 & n.5), the tobacco cases likewise rejected the City's theory that allegations of misleading the public overcome the proximate cause bar. So, while there is no allegation of "misleading the public" against ConocoPhillips, even if there were, that would not satisfy proximate cause. As to this holding of the tobacco cases, the City again stands mute.

Lastly, the City attempts to sow confusion by citing a district court case, which the City misleadingly says was a "nuisance suit against tobacco manufacturers [that] survived [a] motion to dismiss." NYC Br. 9 (citing *City of New York* v. *Milhelm Attea & Bros.*, 550 F. Supp. 2d 332, 351 (E.D.N.Y. 2008)). The City fails to disclose that the case was about wholesalers (not manufacturers) that sold cigarettes without tax stamps in violation of federal law. It had literally nothing to do with any issue here.

3. *The City misleads as to the amicus brief in AEP*. The City states (at 3) that the API filed an *amicus* brief in *AEP* conceding that "its members 'would be the target of future nuisance suits' under the theory of *AEP*," creating the misimpression that the feared nuisance suits were about oil and gas production. Not so. For starters, that *amicus* brief was filed not just by API, but by *eleven* groups for industries that "conduct operations that result in carbon dioxide ('CO_2') emissions, primarily from the *burning* of fossil fuel," including the Chamber of Commerce, and the auto, paper, chemical, construction, and manufacturing industries (among others). Ex. A at 4 (emphasis added). More egregiously, the City omits words from the language it quotes. What the *amicus* brief says is that if the lawsuit against emitters in *AEP* were sustained, the *amici* businesses "would be the target of future nuisance suits *seeking to control greenhouse gas emissions*." *Id.* at 5

(emphasis added). The *amicus* brief in no way adopted the fantastic position that global-warming nuisance lawsuits against oil and gas production could somehow be proper.

4. *The City's reliance on the principle that multiple tortfeasors contributing to a nuisance are jointly liable is misplaced.* It has nothing to do with proximate cause. Again, *Sturm Ruger* made this clear. The Court found "fatally flawed plaintiff's contention that, in order to advance a cognizable common-law public nuisance claim, it need only allege and prove that defendants' business practices created or contributed to the maintenance of a 'public nuisance.'" *Sturm Ruger*, 309 A.D.2d at 103. Rather, proximate cause is an *additional* requirement: "While plaintiff . . . must prove defendants caused or contributed to the nuisance," this does *not* mean that "no matter how far removed from defendants' lawful business practices the harm is felt, defendants nevertheless remain liable under a common-law public nuisance theory." *Id.* at 103-04.

Judge Posner's decision in *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 696-97 (7th Cir. 2008) (*en banc*) (NYC Br. 6) does not support the City's case. There, a teenaged boy was shot by Hamas. His parents sued a Hamas donor under federal statutes barring terrorist funding. The Court rejected the donor's argument that it was not liable because there are many donors to Hamas, making it unknowable whether its funds bought the gun. *Id.* at 696. The Court analogized to the classic case of *Summers* v. *Tice*, 199 P.2d 1, 3 (Cal. 1948), where two hunters who fired their rifles simultaneously were found liable for injuring a third, because it was not known who hit the victim. This does not mean the injured hunter could sue the rifle *manufacturer*, which knew its rifles would be used for hunting and that injuries would inevitably ensue.[5]

5. *Foreseeability is not sufficient*. Contrary to the City's argument (at 7), the alleged foreseeability of the City's injury does not make its claims viable. As *Sturm Ruger* and the circuit

[5] The City's other cases are inapposite. *See Cox* v. *City of Dallas*, 256 F.3d 281 (5th Cir. 2001) (illegal dumping harmed neighboring property); *Warren* v. *Parkhurst*, 45 Misc. 466 (Montgomery Cty. 1904) (26 mills polluted stream); *Abbatiello* v. *Monsanto Co.*, 522 F. Supp. 2d 524, 541 (S.D.N.Y. 2007) (manufacturer induced GE to use PCBs contaminating nearby land); *Higazy* v. *Templeton*, 505 F.3d 161 (2d Cir. 2007) (coerced confession caused confinement); *Caso* v. *Dist. Counsel 37, AFSCME*, 43 A.D.2d 159 (2d Dep't 1973) (illegal sewer-worker strike caused spill).

tobacco decisions make clear, foreseeability, while necessary, is not sufficient. It was foreseeable that the manufacture of cigarettes would lead to the tobacco plaintiffs' injuries, just as it was foreseeable that the manufacture of guns would result in gun violence. But the claims still failed to satisfy proximate cause. *See Laborers Local 17 Health & Benefit Fund* v. *Philip Morris, Inc.*, 191 F.3d 229, 236, 240 (2d Cir. 1999) ("foreseeability" and "remoteness" are "distinct concepts"; proximate cause requires "chain of causation leading to damages [that] is not complicated by the intervening agency of third parties"; "substituting the foreseeability test" is "error"); *Steamfitters*, 171 F.3d at 926 ("foreseeability [is] insufficient to overcome the remoteness of the [plaintiff's] injury from the defendants' wrongdoing"); *Sturm Ruger*, 309 A.D.2d at 103 ("the harm plaintiff alleges is far too remote from defendants' otherwise lawful commercial activity").

The Second Circuit, in another case where injury was foreseeable but the claim was barred as remote, aptly illustrated the point: one who causes "an accident in the Brooklyn Battery Tunnel during rush hour" will "foreseeabl[y]" harm "thousands" — but is liable only to "those physically injured in the crash." *Kinsman Transit* v. *City of Buffalo*, 388 F.2d 821, 825 n.8 (2d Cir. 1968).

6. *The City's reliance on MTBE is unavailing*. The Court in *In re MTBE*, 725 F.3d 65 (2d Cir. 2013) (NYC Br. 2, 5) upheld a jury verdict (including nuisance and trespass claims) against a defendant that negligently spilled gasoline containing an additive (MTBE) that it knew would likely contaminate the Queens water supply, and sold that defective product to others with knowledge that it would leak and be spilled. In upholding the verdict, the Court took pains to make clear that for defendant to be liable, "the jury was required to find not only that the company used MTBE, but that it engaged in additional tortious conduct, such as failing to exercise ordinary care in preventing and cleaning up gasoline spills." *Id*. at 96; *see also id*. at 104 (defendant "engaged in additional tortious conduct"; "the mere use of MTBE would not have caused the company to incur liability"); *id*. at 118-19 (noting "ample evidence of gasoline spills and leaks" at defendant's stations, stemming from "inexperienced" employees, "unregistered" tanks, and failure to take steps to "prevent, or at least mitigate" the "contamination incidents," which "breached the standard of ordinary care"); *id*. at 124 (upholding verdict that MTBE gasoline was defective).

Indeed, this Court has already recognized that *MTBE* did not recognize a "more generous legal standard" on proximate cause than traditional principles require, including that defendant "played a sufficiently direct role in causing the [harm alleged]." *Sahu* v. *Union Carbide Corp.*, 2014 WL 3765556, at *7 (S.D.N.Y. July 30, 2014), *aff'd*, 650 F. App'x 53 (2d Cir. 2016). Thus, as this Court recognized in *Sahu*, defendant in *MTBE* "incurred tort liability not for the mere use of MTBE, but because it engaged in additional tortious conduct." *Id.* at *8 (quoting *In re MTBE*, 725 F.2d at 101 n.22). Absent such additional tortious conduct, this Court in *Sahu* followed *Sturm Ruger*, recognizing that "the production of chemicals itself" did not "constitute[] legal causation of a tort." *Id.* at *11 (citing *People ex rel. Spitzer* v. *Sturm Ruger*, 309 A.D.2d at 103-104).

No such tortious conduct is alleged against ConocoPhillips here. Nor is oil or gas a defective product. And the chain of causation here is exponentially more attenuated (and spatially and temporally remote) than in *MTBE*.[6] *MTBE* thus does not salvage the City's claims.

7. *The City's discussion of tobacco farmers and cigarette manufacturers only confirms the fatal flaws of its case*. The City purports to disclaim (at 13) that, under its theory, public nuisance suits would be viable even against tobacco farmers. But why? Tobacco farmers sell a nondefective product to cigarette manufacturers, knowing it will be used to make cigarettes, which they know will cause injuries. They know (and it is plainly foreseeable) that that will result in costs to governmental entities and health care payors. Tobacco farmers could certainly be said to have contributed to a purported "tobacco nuisance": without tobacco, there would be no cigarettes to burn. But such a suit fails for the same reason this one does: no proximate cause.

It is idle to debate (as the City does, at 13) whether ConocoPhillips is more like a cigarette manufacturer or a tobacco farmer, for even the claims against the *cigarette manufacturers* were

[6] The City's suggestion (at 12) that "spatial and temporal proximity" is irrelevant is contrary to New York law (and the Restatement). *See Hain* v. *Jamison*, 28 N.Y.3d 524, 530 (2016) ("passage of time" and "spatial gap" relevant to proximate cause); *Restatement (Second) of Torts* § 433 ("lapse of time" relevant). Indeed, as the City's cases recognize, *Sturm Ruger* "emphasized that public nuisance considers 'spatial proximity' and 'temporal proximity.'" *Williams* v. *Dow Chem. Co.*, 2004 WL 1348932, *20-21 (S.D.N.Y. June 16, 2004) ("doubt[ing]" whether public nuisance claim against pesticide maker "survive[s]" *Sturm Ruger*, but declining summary judgment as discovery ongoing).

held to be barred by proximate cause. ConocoPhillips does not maintain dismissal is required because ConocoPhillips' subsidiary is a producer (rather than a refiner) of oil and gas. *Either* is far too remote to satisfy the requirement of proximate cause.

8. *Proximate cause is not a question of fact here*. The City asserts (at 14), citing *Derdiarian* v. *Felix Contracting Corp.*, 51 N.Y.2d 308, 315 (1980), that "proximate cause is a classic question of fact." Often it is — for example, in *Derdiarian*, where defendant negligently maintained a construction zone, and a worker was injured when a driver suffered a seizure and crashed into the zone, proximate cause was a fact issue. But as the federal tobacco decisions and *Sturm Ruger* demonstrate, lack of proximate cause often can and should be decided on the pleadings. *See also Paladini* v. *Capossela, Cohen, LLC*, 515 F. App'x 63, 65 (2d Cir. 2013) (summary order) ("Contrary to [plaintiff's] assertion, a district court can dismiss an action based on proximate cause at the pleading stage."). *Derdiarian* is not contrary. *See* 51 N.Y.2d at 315 ("There are certain instances . . . where . . . legal cause may be decided as a matter of law.").

This is not a close case. The City's claims plainly fail under settled principles. Dismissal should be granted.

II. There is no personal jurisdiction over ConocoPhillips.

This Court has deferred further briefing on personal jurisdiction. Dkt. #89. As the parties stated in a joint letter (Dkt. #62), under *Chevron Corp.* v. *Naranjo*, 667 F.3d 232, 246 n.17 (2d Cir. 2012), since this case has "multiple defendants — over some of whom the court indisputably has personal jurisdiction," and defendants "challenge the legal sufficiency of the plaintiff's cause of action," the Court can "address first the facial challenge to the underlying cause of action."

CONCLUSION

The "role [of] a federal court sitting in diversity is not to adopt innovative theories that may distort established state law." *Nat'l Union Fire Ins. Co. of Pittsburgh* v. *Stroh Cos.*, 265 F.3d 97, 106 (2d Cir. 2001). And a court applying federal common law "does not have creative power akin to that vested in Congress." *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 422 (2011). This Court should apply settled principles of proximate cause and dismiss the City's claims.

Dated: May 4, 2018
New York, New York

Respectfully submitted,

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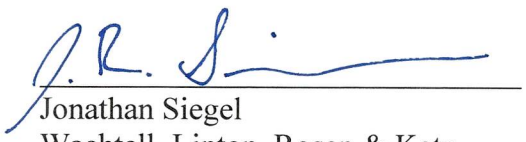
AFFIRMATION OF SERVICE

I, Jonathan Siegel, declare under penalty of perjury that I caused a copy of ConocoPhillips' Reply Memorandum of Law Addressing Individual Issues in Support of its Motion to Dismiss Plaintiff's Amended Complaint dated May 4, 2018, and the Reply Declaration of Jonathan Siegel in Support of ConocoPhillips' Motion to Dismiss Plaintiff's Amended Complaint dated May 4, 2018 to be served upon all counsel of record via ECF on May 4, 2018.

Dated: May 4, 2018

WACHTELL, LIPTON, ROSEN & KATZ

By: 

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