

STERN KILCULLEN & RUFOLO, LLC

Herbert J. Stern

hstern@sgklaw.com

Joel M. Silverstein

jsilverstein@sgklaw.com

325 Columbia Turnpike, Suite 110

Florham Park, New Jersey 07932-0992

Telephone: 973.535.1900

Facsimile: 973.535.9664

GIBSON, DUNN & CRUTCHER LLP

Theodore J. Boutrous, Jr., *pro hac vice*

tboutrous@gibsondunn.com

333 South Grand Avenue

Los Angeles, CA 90071

Telephone: 213.229.7000

Facsimile: 213.229.7520

Attorneys for Defendants

Chevron Corp. and Chevron U.S.A. Inc.

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

CITY OF HOBOKEN,

Plaintiff,

v.

EXXON MOBIL CORP.,
EXXONMOBIL OIL CORP., ROYAL
DUTCH SHELL PLC, SHELL OIL
COMPANY, BP P.L.C., BP AMERICA
INC., CHEVRON CORP., CHEVRON
U.S.A. INC., CONOCOPHILLIPS,
CONOCOPHILLIPS COMPANY,
PHILLIPS 66, PHILLIPS 66

Case No. 2:20-cv-14243

JMV-MF

**DEFENDANTS' NOTICE OF
SUPPLEMENTAL AUTHORITY**

COMPANY, AMERICAN
PETROLEUM INSTITUTE,

Defendants.

Defendants write to inform the Court of the Second Circuit’s decision in *City of New York v. Chevron Corp., et al.*, ___ F.3d ___, 2021 WL 1216541 (2d Cir. Apr. 1, 2021), which affirmed the dismissal of an action that, like this one, sought to hold energy producers liable for climate change-related harms under state tort law.¹ In doing so, the Second Circuit specifically held that the plaintiff engaged in “artful pleading” by attempting to “transform the City’s Complaint into anything other than a suit over global greenhouse gas emissions.” *Id.* at *5. That decision is relevant to this case for at least three reasons.

First, *City of New York* supports Defendants’ argument that this case was properly removed under the Court’s federal-question jurisdiction because the court found that “Plaintiff’s claims necessarily arise under federal, not state, law, because they seek to regulate transboundary and international emissions and pollution.” Dkt. 100 at 12. As the Second Circuit explained, “[g]lobal warming presents a uniquely international problem of national concern [and] is therefore not well-suited to the application of state law,” *City of New York*, 2021 WL 1216541, at *6, and as a result, claims seeking damages for the alleged impacts of global climate change “must be brought under federal common law,” *id.* at *9. And while Plaintiff insists that federal-question jurisdiction does not exist over this action because “[n]one of

¹ This Notice of Supplemental Authority is submitted subject to, and without waiver of, any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

Hoboken’s claims rely on federal law, and none seek to adjudicate compliance with any federal statute,” Dkt. 94 at 9, *City of New York* held that the plaintiff’s claims were necessarily governed by federal common law despite being pleaded under state law, expressly rejecting the plaintiff’s effort to disguise “those federal claims” as state-law claims, *City of New York*, 2021 WL 1216541, at *9.; *see also id.* at *5 (“Artful pleading cannot transform the City’s complaint into anything other than a suit over global greenhouse gas emissions.”).

When a claim “arise[s] under federal common law,” there “is a permissible basis for jurisdiction based on a federal question.” *Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007). For this reason, any attempt to distinguish *City of New York* on the ground that it addressed a dismissal on the merits, whereas here the question before the Court is the propriety of removal, must fail. Although the Second Circuit specifically reserved the issue of removal, its logic compels federal jurisdiction in this case. That is because once the Court concludes that Plaintiff’s claims “must be brought under federal common law,” *City of New York*, 2021 WL 1216541, at *9, it necessarily follows that there “is a permissible basis for jurisdiction based on a federal question,” *Treiber & Straub*, 474 F.3d at 383; *see also City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) (“[I]f federal common law exists, it is because state law cannot be used.”).

Second, *City of New York* supports Defendants’ argument that federal

jurisdiction exists under the federal officer removal statute, the Outer Continental Shelf Lands Act, and federal enclave jurisdiction. In opposing removal on these grounds, Plaintiff tries to recast its claims as going only to Defendants' marketing of fossil-fuel products, rather than the production, sale, and combustion of those products. In particular, it contends that removal is improper because Defendants did not engage in any marketing under the direction or control of federal officers, *see* Dkt. 94 at 38–44, or in marketing on the Outer Continental Shelf or federal enclaves, *see id.* at 51–52, 54. But as the Second Circuit explained, “emissions [are] the singular source of the City’s harm,” and “[g]reenhouse gases once emitted become well mixed in the atmosphere,” at which point they “cannot be traced back to their source.” *City of New York*, 2021 WL 1216541, at *5–6. As a result, the Second Circuit held that the plaintiff’s claims were inseparable from activities occurring worldwide: “In other words, the City requests damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet.” *Id.* at *6. Although the plaintiff in *City of New York*, like Plaintiff here, tried to focus on a different “link in ‘the causal chain’ of the City’s damages,” *id.* at *5, the Second Circuit squarely rejected this as “[a]rtful pleading,” *id.* at *5; *see also id.* at *11 (“[T]he City’s focus on this ‘earlier moment’ in the global warming lifecycle is merely artful pleading and does not change the substance of its claims.”).

Moreover, claims like Plaintiff’s here will necessarily impact the worldwide

production of fossil fuels. As the Second Circuit explained, “while the City is not expressly seeking to impose a standard of care or emission restrictions on the Producers, the goal of its lawsuit is perhaps even more ambitious: to effectively impose strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who released them).” *Id.* at *7. This necessarily includes, among other things, the production of fossil fuels from the Outer Continental Shelf and under the direction, supervision, and control of federal officers—and, as *City of New York* confirms, necessarily “threatens to impair the total recovery of the federally-owned minerals” on the Outer Continental Shelf. Dkt. 100 at 30 (quoting *EP Operating Ltd. v. Placid Oil Co.*, 26 F.3d 563, 570 (5th Cir. 1994)). After all, “[i]f the Producers want to avoid all liability, then their only solution would be to cease global production altogether.” *City of New York*, 2021 WL 1216541, at *7.

Because Plaintiff’s claims involve the production, sale, and combustion of fossil fuels—which occurred under the direction, supervision, and control of federal officers, and which occurred on the Outer Continental Shelf and federal enclaves—Plaintiff’s motion to remand should be denied.

Third, *City of New York* supports Defendants’ argument that federal jurisdiction exists under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) because Plaintiff’s claims here, like those

asserted in New York, “attempt to supplant federal energy policy, exercise the federal foreign affairs power, and regulate Defendants’ speech over matters of public concern.” Dkt. 100 at 20. As the Second Circuit recognized, “greenhouse gas emissions are the subject of numerous federal statutory regimes and international treaties” that “provide interlocking frameworks for regulating greenhouse gas emissions, as well as enforcement mechanisms to ensure that those regulations are followed.” *City of New York*, 2021 WL 1216541, at *1; *id.* at *6 (finding that these claims “implicat[e] . . . our relations with foreign nations”). Plaintiff “has sidestepped those procedures and instead instituted a state-law tort suit . . . to recover damages caused by those companies’ admittedly legal commercial conduct in producing and selling fossil fuels around the world.” *Id.* But “in so doing, [Plaintiff] effectively seeks to replace these carefully crafted frameworks—which are the product of the political process—with a patchwork of claims under state nuisance law.” *Id.* The Second Circuit emphatically rejected this position, holding that it could not “condone such an action.” *Id.*

Respectfully submitted,

Dated: April 9, 2021
Florham Park, New Jersey

By: /s/ Herbert J. Stern
Herbert J. Stern

By: /s/ Paul J. Fishman
Paul J. Fishman

STERN, KILCULLEN & RUFOLO,
LLC
Herbert J. Stern

ARNOLD & PORTER KAYE
SCHOLER LLP
Paul J. Fishman
paul.fishman@arnoldporter.com
One Gateway Center
Newark, NJ 07102-5310
Telephone: (973) 776-1901
Facsimile: (973) 776-1919

Nancy Milburn, *pro hac vice*
nancy.milburn@arnoldporter.com
Diana Reiter, *pro hac vice*
diana.reiter@arnoldporter.com
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8000
Facsimile: (212) 836-8689

Matthew T. Heartney, *pro hac vice*
matthew.heartney@arnoldporter.com
John D. Lombardo, *pro hac vice*
john.lombardo@arnoldporter.com
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Telephone: (213) 243-4000
Facsimile: (213) 243-4199

Jonathan W. Hughes, *pro hac vice*
jonathan.hughes@arnoldporter.com
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Telephone: (415) 471-3156
Facsimile: (415) 471-3400

*Attorneys for Defendants
BP plc and BP America Inc.*

By: /s/ Kevin H. Marino
Kevin H. Marino

hstern@sgklaw.com
Joel M. Silverstein
jsilverstein@sgklaw.com
325 Columbia Turnpike, Suite 110
Florham Park, New Jersey 07932-0992
Telephone: 973.535.1900
Facsimile: 973.535.9664

GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutros, Jr., *pro hac vice*
tboutros@gibsondunn.com
William E. Thomson, *pro hac vice*
wthomson@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: 213.229.7000
Facsimile: 213.229.7520

Andrea E. Neuman, *pro hac vice*
aneuman@gibsondunn.com
200 Park Avenue
New York, NY 10166
Telephone: 212.351.4000
Facsimile: 212.351.4035

Thomas G. Hungar, *pro hac vice*
thungar@gibsondunn.com
1050 Connecticut Avenue, N.W.,
Washington, DC 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

Joshua D. Dick, *pro hac vice*
jdick@gibsondunn.com
555 Mission Street
San Francisco, CA 94105
Telephone: 415.393.8200
Facsimile: 415.374.8451

SUSMAN GODFREY L.L.P

MARINO, TORTORELLA & BOYLE,
P.C.

Kevin H. Marino
kmarino@khmarino.com
John D. Tortorella
jtortorella@khmarino.com
437 Southern Boulevard
Chatham, NJ 07928
Tel: (973) 824-9300
Fax: (973) 824-8425

PAUL, WEISS, RIFKIND,
WHARTON
& GARRISON LLP
Theodore V. Wells, Jr., *pro hac vice*
twells@paulweiss.com
Daniel J. Toal, *pro hac vice*
dtoal@paulweiss.com
Yahonnes Cleary, *pro hac vice*
ycleary@paulweiss.com
Caitlin E. Grusaukas, *pro hac vice*
cgrusaukas@paulweiss.com
1285 Avenue of the Americas
New York, NY 10019
Tel: (212) 373-3000
Fax: (212) 757-3990

*Attorneys for Defendants Exxon Mobil
Corp. and ExxonMobil Oil Corp.*

By: Anthony P. Callaghan
Anthony P. Callaghan

GIBBONS P.C.
Anthony P. Callaghan, Esq.
Thomas R. Valen, Esq.
Sylvia-Rebecca Gutiérrez, Esq.
One Gateway Center

Erica W. Harris, *pro hac vice*
eharris@susmangodfrey.com
1000 Louisiana, Suite 5100
Houston, TX 77002
Telephone: (713) 651-9366
Facsimile: (713) 654-6666

*Attorneys for Defendants
Chevron Corp and Chevron U.S.A. Inc.*

By: /s/ Anthony J. Zarillo, Jr.
Anthony J. Zarillo, Jr.

RIKER DANZIG SCHERER
HYLAND & PERRETTI LLP
Anthony J. Zarillo, Jr.
azarillo@riker.com
Jeffrey M. Beyer
jbeyer@riker.com
One Speedwell Avenue
Morristown, NJ 07962-1981
Telephone: 973.538.0800
Facsimile: 973.451.3708

MCGUIREWOODS LLP
Andrew G. McBride, *pro hac vice*
amcbride@mcguirewoods.com
2001 K Street N.W.
Suite 400
Washington, DC 20006-1040
Telephone: 202.857.2487
Facsimile: 202.828.2987

Brian D. Schmalzbach, *pro hac vice*
bschmalzbach@mcguirewoods.com
800 East Canal Street
Richmond, VA 23219
Telephone: 804.775.4746
Facsimile: 804.698.2304

Newark, NJ 07102
Tel: (973) 596-4500
Fax: (973) 596-0545
acallaghan@gibbonslaw.com
tvalen@gibbonslaw.com
sgutierrez@gibbonslaw.com

LATHAM & WATKINS LLP
Steven M. Bauer, *pro hac vice*
Steven.Bauer@lw.com
Margaret A. Tough, *pro hac vice*
Margaret.Tough@lw.com
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Tel: (415) 391-0600
Fax: (415) 395-8095

*Attorneys for Defendants Phillips 66
and Phillips 66 Company*

By: /s/ Jeffrey S. Chiesa
Jeffrey S. Chiesa

CHIESA SHAHINIAN &
GIANTOMASI PC
Jeffrey S. Chiesa
jchiesa@csglaw.com
Dennis M. Toft
dtoft@csglaw.com
Michael K. Plumb
mplumb@csglaw.com
One Boland Drive
West Orange, New Jersey 07052
Telephone: (973) 325-1500
Facsimile: (973) 325-1501

BARTLIT BECK LLP
Jameson R. Jones, *pro hac vice*
jameson.jones@bartlitbeck.com

*Attorneys for Defendant American
Petroleum Institute*

By: /s/ Loly G. Tor
Loly G. Tor

K&L GATES LLP
Loly G. Tor
loly.tor@klgates.com
One Newark Center, 10th Fl.
Newark, NJ 07102
Phone: (973) 848-4026

KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
David C. Frederick, *pro hac vice*
dfrederick@kellogghansen.com
Grace W. Knofczynski, *pro hac vice*
gknofczynski@kellogghansen.com
Daniel S. Severson, *pro hac vice*
dseverson@kellogghansen.com
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Phone: (202) 326-7900

*Attorneys for Defendants Royal Dutch
Shell plc and Shell Oil Company*

Daniel R. Brody, *pro hac vice*
dan.brody@bartlitbeck.com
Sean C. Grimsley, *pro hac vice*
sean.grimsley@bartlitbeck.com
1801 Wewatta Street
Suite 1200
Denver, CO 80202
Telephone: (303) 592-3100
Facsimile: (303) 592-3140

LATHAM & WATKINS LLP
Steven M. Bauer, *pro hac vice*
Steven.Bauer@lw.com
Margaret A. Tough, *pro hac vice*
Margaret.Tough@lw.com
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Tel: (415) 391-0600
Fax: (415) 395-8095

Attorneys for Defendants
ConocoPhillips and ConocoPhillips
Company