Hon. Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiff,

v.

BP P.L.C., a public limited company of England and Wales, CHEVRON CORPORATION, a Delaware corporation, CONOCOPHILLIPS, a Delaware corporation, EXXON MOBIL CORPORATION, a New Jersey corporation, ROYAL DUTCH SHELL PLC, a public limited company of England and Wales, and DOES 1 through 10,

Defendants.

Case No. C18-758RSL

REPLY IN SUPPORT OF PARTIALLY UNOPPOSED MOTION TO STAY PROCEEDINGS BY PLAINTIFF KING COUNTY

NOTE ON MOTION CALENDAR:
Sept. 21, 2018

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INTRODUCTION

In their opposition, Chevron and BP do not deny that the entire defense group initially suggested staying this action, and that the many novel arguments raised by their motions to dismiss have generated disagreement among judges in the Northern District of California—a disagreement expected to be resolved by pending appeals in the Ninth Circuit. But they now propose that all the parties (including their three unwilling co-defendants) should finish briefing these same issues, and that the Court should decide them—and that this case should *then* be stayed only if these issues are decided in the County's favor. Opp'n of Defs. Chevron Corp. & BP p.l.c. to Pl.'s Mot. Stay Proceedings ("Opp'n") at 2 (Doc. No. 126). The Chevron/BP proposal makes clear that the only "damage" to Chevron and BP from staying the case now is that these two defendants would be deprived of a shot at persuading this Court to write a decision that they could cite in the California appeals. *Id*. But Chevron and BP do not cite a single case where a stay was denied merely so a court could provide ammunition to one side or another in related appeals. And the key points remain undisputed: staying this case would save all parties and the Court from an enormous ongoing expenditure of resources on the motions to dismiss, and (some dubious tactical considerations aside) would not cause harm to anyone. As BP and Chevron admit, this Court has "broad discretion" to stay this case. *Id*. at 5. This discretion should be exercised now, not after the unnecessary expenditure of substantial resources.

ARGUMENT

Chevron and BP agree with the County that three factors are relevant to staying a case—(1) damage to the non-movant from a stay, (2) harm to the movant from going forward, and (3) the orderly course of justice. *Id*. at 3. But their analysis of each factor is flawed.

First, there is no damage to Chevron and BP from a stay. Chevron and BP say a stay would "add[] additional costs of the pending suit," and keep open nuisance claims that "vilify the men and women" of Chevron and BP. *Id*. at 4. Neither argument makes sense. A stay would not "add additional costs." On the contrary, with a stay, no one would expend any resources until the Ninth Circuit decides whether to sustain the dismissal of claims that BP and Chevron say are "identical" to the County's claim. Chevron Corp.'s Mot. Dismiss 1 (Doc. No. 117)

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("materially identical"); Def. BP p.l.c.'s Mot. Dismiss 1 (Doc. No. 119) ("identical"). No matter how the Ninth Circuit rules, the parties can use that ruling to advise this Court on the County's claims—advice that might be straightforward given the similarities between this action and the Oakland/SF Actions. On the other hand, if this case is *not* stayed now, then the County must write oppositions to the six motions to dismiss, and all five defendants, including the three defendants who support this stay motion, must write reply briefs and, presumably, participate in any oral argument that is scheduled—all the while prognosticating about how the Ninth Circuit will sort out the conflicting opinions by Judges Alsup and Chhabria. And even then, whatever decision this Court makes will not necessarily advance the resolution of the County's claims: any dismissal of the County's claims likely would be met with a new appeal contingent on the Oakland/SF appeal, and any denial of the motions to dismiss would be met with (as BP and Chevron admit) a new motion to stay the case. Opp'n 2. Chevron and BP seem to believe that, having already drafted their initial motions to dismiss, an expenditure of additional resources is worthwhile, based on their hope that this Court will give them a "win" they can cite to the Ninth Circuit in the pending appeals. But Chevron and BP do not cite any cases where a court has declined to stay an action on this basis.[1] In any event, letting the case go forward is *not* the way to avoid "adding additional costs of the pending suit." The opposite is true.

Denying the stay is also not going to produce a more rapid vindication of the supposedly "vilif[ied]" employees of Chevron and BP. Opp'n 4. It is true that all the defendants are accused of selling a product that is killing people and causing massive damage, *see, e.g.*, First Am. Compl. ¶¶ 187–191 (Doc. No. 113), and of deceiving consumers about these effects, *id.* ¶¶ 155–158. But to date, defendants' primary response has been that this case must be dismissed because the problems they have helped create are too *big* for a court to solve, with alleged impacts on foreign policy and various regulatory schemes. And Chevron and BP propose to stay

[1] *See ASIS Internet Servs. v. Member Source Media, LLC*, No. C-08-1321 EMC, 2008 WL 4164822, at *2 (N.D. Cal. Sept. 8, 2008) (non-moving party's "litigation-related injury" from being unable to move forward and delay in obtaining a money judgment are not cognizable damage from a stay, unlike "real market injury" or "deprivation of liberty").

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this case only if the motions to dismiss are denied, precisely to *forestall* answering these factual allegations and providing discovery. Opp'n 2. This is not the conduct of someone eager to disprove attacks on their reputation as quickly as possible. In any event, once again Chevron and BP cite no case showing that this vague sort of "damage" suffices to justify denying a stay.

In sum, there are no harms to Chevron and BP from a stay—staying the case does not impose any "additional costs of the pending suit" on Chevron or BP, or do harm to anyone's reputation.

Second, there is clear "hardship or inequity" to the County and the three other defendants from moving forward. Relying on *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005), BP and Chevron say that forcing the County and its three co-defendants to litigate all the potentially redundant issues raised by the motions to dismiss is not a meaningful burden, and also that the County should have sought a stay sooner. Opp'n 4. Again, neither argument makes sense. To begin with, as Chevron and BP admit, a showing of hardship to the County and the other three defendants from moving forward is required only if there is a showing of damage to Chevron and BP from the stay.[2] And as noted above, the stay causes no such damage to any defendant, as three of the defendants have essentially acknowledged by supporting this stay request. Moreover, wasteful litigation *is* a relevant hardship to the County and the other three defendants, and many courts (including this Court) have held that lawsuits can and should be stayed to avoid forcing parties to litigate issues likely to be resolved by an appeal or some other proceeding.[3] As one such case points out, "it would result in prejudice to both parties if the

[2] S*ee* Opp'n 3 ("because Chevron and BP will be harmed by a stay, King County must make a 'clear case of hardship or inequity'"); *Lockyer*, 398 F.3d at 1112; *Nilsen v. Erickson*, No. 16-CV-03631-EMC, 2017 WL 3267494, at *4 n.1 (N.D. Cal. Aug. 1, 2017); *Ctr. for Biological Diversity v. Henson*, No. CIV. 08-946-TC, 2009 WL 1882827, at *4 (D. Or. June 30, 2009).

[3] *RSUI Indem. Co. v. Vision One, LLC*, No. C08-1386RSL, 2010 WL 596193, at *2 (W.D. Wash. Feb. 12, 2010) (where state-court judgment under appeal was a primary basis for non-moving party's proof of damages, action would be stayed pending state-court appeal, because "it would be efficient for its own docket and the fairest course for the parties to enter a stay of this action pending resolution of the related issues in state court."); *Amadeck v. Capital One Fin. Corp.*, No. C12-0244RSL, 2012 WL 5472173, at *1 (W.D. Wash. Nov. 9, 2012) (granting stay pending decision from JPML on whether to transfer the case: the "efficiencies obtained by coordinating discovery and pretrial practices across a number of separate cases cannot be doubted"); *Ochoa v. Campbell*, No. 1:17-CV-03124-SMJ, 2017 WL

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decision reached by the Ninth Circuit required additional expense and effort in this case by virtue of the case proceeding forward without awaiting its decision."[4] Many of these cases were cited in the County's opening papers, but have never been distinguished by Chevron and BP. The waste involved in charging ahead now is undeniable and compelling.

Instead, Chevron and BP have responded by citing *Lockyer* and one other case where litigation burdens on the moving party were not enough to justify a stay. But in both instances the other proceeding was less relevant (or totally irrelevant) to the parties' dispute, and the non-movant suffered tangible harms from not being able to move forward with its case.[5] This is indisputably not the situation here, as described above. In fact, Chevron and BP have made their own informal stay proposal, which is effectively an *admission* that it is pointless and burdensome to litigate issues that are already on appeal—the only difference is that *they* want the Court to decide *their* motions to dismiss, and *then* to stay the case only if these motions are denied. Opp'n 2. In other words, avoiding redundant litigation *is* (according to Chevron and BP) a sufficient reason to stay proceedings, but only *after* defendants have had their shot at persuading this Court to enter a dismissal. The plain truth is that litigating the case is as wasteful now as it would be later.

5639938, at *2 (E.D. Wash. Aug. 25, 2017) (staying case to protect non-moving party from burdens of litigation); *cf. Bay Area Surgical Grp., Inc. v. Aetna Life Ins. Co.*, No. 5:13-CV-05430 EJD, 2014 WL 2759571, at *6 (N.D. Cal. June 17, 2014) (when "the opponent does not adduce evidence that it will be harmed by a stay . . . courts have considered the moving party's burden in litigating the case to be a legitimate form of hardship") (alteration in original).

[4] *Karoun Dairies, Inc. v. Karlacti, Inc.*, No. 08CV1521 AJB WVG, 2013 WL 4716202, at *3 (S.D. Cal. Sept. 3, 2013); *accord Timmons v. Veal*, No. 2:06-CV-01385MMM, 2009 WL 1321501, at *1 (E.D. Cal. May 12, 2009) ("It is in the interest of justice to await [an appellate decision] rather than proceeding and having to reconsider the case.").

[5] *See Lockyer*, 398 F.3d at 1112 (no value to waiting for decision from bankruptcy court in related case, because bankruptcy court was not considering the issue, and harm to plaintiff from stay was massive, in the form of higher electricity prices in almost half of Northern California); *Mix v. Ocwen Loan Servicing, LLC*, No. C17-0699JLR, 2017 WL 5549795, at *8 (W.D. Wash. Nov. 17, 2017) ("specific information regarding the potential destruction of cell phone records" showed that plaintiff was harmed by a stay, and value of related appeal was limited because "factual disputes" would remain regardless); *cf. Alvarez v. T-Mobile USA, Inc.*, No. 2:10-2373-WBS, 2010 WL 5092971, at *2 n.2 (E.D. Cal. Dec. 7, 2010) (*Lockyer* language on burdens of litigation is "dicta"; being forced to litigate issues that might go away entirely because of related proceedings is a relevant hardship).

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Chevron and BP are also wrong that the County should have sought a stay sooner. It bears repeating that Chevron's own lawyer raised the idea first, on behalf of the entire defense group; the County agreed to a stay only three business days later, and only two business days after Oakland and San Francisco filed their appeal. There was no improper delay.[6]

Third, the orderly course of justice also favors a stay. Chevron and BP appear to concede the obvious point that judicial economy favors a stay, which is a prime component of "orderliness."[7] Instead, they argue that a stay is not "orderly" because the Oakland/SF appeal may not conclude for a year or more. Opp'n 5. Chevron and BP cite one case where a stay order was reversed because after two years the related proceeding had not even started, *see Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1067 n.6 (9th Cir. 2007), but here briefing in the Oakland/SF Actions in the Ninth Circuit is due to finish only three months after briefing finishes in this Court; defendants in the meantime are not subject to a preliminary injunction. The Oakland/SF appeal is thus likely to conclude well within what other courts have found to be a "reasonable time." *See Leyva v. Certified Grocers*, 593 F.2d 857, 864 (9th Cir. 1979).[8] Chevron and BP also argue that defendants will have to re-brief their motions to dismiss once the Ninth Circuit rules, Opp'n 5, but this is likely no matter what—far better to

[6] Chevron and BP also make the rhetorical point that the global warming cannot really be an urgent problem in King County, as the amended complaint alleges, because the County seeks the stay that defendants first proposed. Opp'n 2. But the truth is that ultimately there can be no relief in this case (and if Chevron and BP have their way, no progress at all beyond the motions to dismiss) until the Ninth Circuit has ruled in the Oakland/SF Actions. There is no hypocrisy by the County.

[7] The six motions to dismiss the amended complaint add up to over 100 pages already, and all five defendants have requested oral argument. The oppositions are likely to be approximately the same length.

[8] *See also Farr v. Private Advisory Grp., LLC*, No. 16-1565-RAJ, 2017 WL 735965, at *3 (W.D. Wash. Feb. 24, 2017) (related proceeding was "complex" and likely to be "time consuming," but "the Court has no reason to presume that this amount of time will become unreasonable"); *Bay Area Surgical Grp.*, 2014 WL 2759571, at *6 (delay of "less than a year" was reasonable); *Huntsman Advanced Materials, L.L.C. v. OneBeacon Am. Ins. Co.*, No. 08-CV-229-WFD, 2010 WL 11531287, at *2 (D. Idaho Feb. 19, 2010) (granting stay pending completion of study expected to take two-and-a-half years); *Ctr. for Biological Diversity*, 2009 WL 1882827, at *3 (six-month stay was reasonable); *ASIS Internet Servs.* 2008 WL 4164822, *2 (expected one-year delay pending the resolution of a Ninth Circuit appeal in another case was reasonable); *Morales v. Lexxiom, Inc.*, No. CV096549SVWDTBX, 2010 WL 11507515, at *13 (C.D. Cal. Jan. 29, 2010) (granting stay pending outcome of arbitration that had not yet started; "there is no evidence that arbitration will not commence and conclude within a reasonable time").

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stop briefing the pending dismissal motions now, *before* they are rendered obsolete. The orderly course of justice plainly favors a stay.

CONCLUSION

The County's stay motion should be granted.

Dated: September 19, 2018

Respectfully submitted,

KING COUNTY

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2018, I filed the foregoing Reply in Support of Partially Unopposed Motion to Stay Proceedings by Plaintiff King County with the Clerk of Court. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to all counsel of record.

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