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June 22, 2020

Hon. Netti C. Vogel
Rhode Island Superior Court
250 Benefit Street
Providence, RI 02903

Re: *Rhode Island v. Chevron et. al.*, --P.C. No. 2018-4716

Dear Judge Vogel:

Here are the Defendants' responses to the questions you raised at the last status conference. We look forward to discussing these responses with you on Wednesday.

**Questions 1 and 2**: ***Should the Court wait for the Rhode Island Supreme Court to decide the appeal in* Martins *before hearing the motion to compel? Should the Court wait for the Rhode Island Supreme Court to decide Martins and the U.S. Supreme Court to decide the Ford Motor cases before deciding the Rule 12(b)(2) motion?***

This Court correctly pointed out that: (1) an issue in both Defendants' Rule 12(b)(2) motion and the State's motion to compel is the required link between Defendants' forum activities and the State's claimed injuries; and (2) that issue is squarely presented in both the *Martins* and *Ford Motor* appeals. As a result, it would be reasonable for the Court to defer ruling on the Rule 12(b)(2) motion and motion to compel until those appeals are resolved. Because the settled law of Rhode Island and the First Circuit requires the State to prove Defendants' forum activities are at least a "but for" cause of the State's claims, Defendants press their Rule 12(b)(2) motion and urge the Court to hear argument on the Rule 12(b)(2) motion as soon as the Court deems it appropriate.[1] In any event, Defendants believe the Court should hear argument on the Rule 12(b)(2) motion and the motion to compel at the same time because the proper test for "relatedness" is at issue in both motions, and there is no sound basis to hear the motion to compel before deciding the Rule 12(b)(2) motion.[2]

[1] Defendants expressly preserve and do not waive their challenges to personal jurisdiction. Certain defendants filed supplemental motions to dismiss that raise additional arguments that are not addressed in the State's motion to compel and thus are not addressed in this submission. The arguments for deferring consideration of the supplemental motions parallel those of the joint defense motion.

[2] Copies of the briefing in the *Ford Motor* and *Martins* appeals are being provided separately for the Court.

***Ford Motor***. Ford argued in its opening brief that the relatedness requirement for specific jurisdiction requires proximate causation. Br. of Pet'r. at 42, *Ford Motor Co. v. Montana Eighth Judicial District Court*, No. 19-368 (U.S. Feb. 28, 2020) ("[I]f a defendant has made contact with a forum, it may be called 'to account . . . for consequences that arise proximately from such activities.'") (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)). This is consistent with First Circuit precedent. *See, e.g., Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996) (applying proximate causation in evaluating personal jurisdiction because it "better comports with the relatedness inquiry" and "but for" causation has no "limiting principle"). The plaintiffs in *Ford Motor*, on the other hand, argue that the relatedness prong imposes no causal requirement, Br. of Resps. at 22, (Mar. 30, 2020), and urge the adoption of a loose "stream of commerce" standard requiring only that a plaintiff be "injured in the state by products that a defendant has routinely promoted and sold in the state." *Id.* at 14–15.

Here, the causal standard is at issue in both the Rule 12(b)(2) motion and the motion to compel. Indeed, the State dedicates a substantial portion of its motion to compel to arguing the causal standard, which itself demonstrates why the Rule 12(b)(2) motion and motion to compel should be considered together. The State concedes that "[t]he relatedness prong incorporates a 'causative threshold,' which is something like a 'proximate cause' nexus." Mot. to Compel at 9 (citation omitted). But the State also claims that the standard is "flexible" and "relaxed," and suggests, contrary to current law, that it does not even have to satisfy the less rigid requirement of "but for" causation. *Id.* at 10. The Supreme Court in *Ford Motor* will address the issue.

***Martins***. *Martins* similarly presents the causation-standard question. There, Judge Stern held that "in order for there to be specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy." *Martins v. Bridgestone Americas Tire Ops. LLC*, No. PC-20 17-2420, 2018 WL 1341662, at *12 (R.I. Super. Mar. 8, 2018). The court then concluded it lacked personal jurisdiction over the Bridgestone defendants because their contacts with Rhode Island were not sufficiently related to plaintiff's claims. *Id.* at *13. In a later decision in the same case, the court further explained that a defendant's in-state conduct must be either the proximate cause or the but-for cause of a plaintiff's alleged injuries to support the exercise of personal jurisdiction. *Martins v. Bridgestone Americas Tire Ops. LLC*, No. PC-2017-2420, 2019 WL 469097, at * 7 (R.I. Super. Feb. 19, 2019). On appeal, the *Martins* plaintiff contends she must show only that Bridgestone sold tires that found their way into Rhode Island, even if those tires did not cause plaintiff's alleged injury. Br. of Appellant at 13, 42, *Martins v. Bridgestone Americas Tire Ops.*, C.A. No. SU-2018-0143-A, (R.I. May 30, 2019).

***Defendants' Rule 12(b)(2) Motion and the State's Motion to Compel***. The proper causal standard is squarely at issue in both the Rule 12(b)(2) motion and the motion to compel. In their Rule 12(b)(2) motion, Defendants have shown that the relatedness prong requires the State to plead that a Defendant's forum activities are at least a "but for" cause of the State's claimed injuries. Rule 12(b)(2) Motion at 9–10. Defendants contend that the State cannot meet that standard because the Complaint alleges that the State's injuries are a result of *global* climate change, purportedly brought about by *worldwide* emissions of greenhouse gases including when fossil fuels, promoted and produced by Defendants and thousands of others around the world, were combusted by billions of businesses, governments, and individual consumers over several decades.

Compl. ¶¶ 1, 3, 19. The State does not and cannot allege that Defendants' contacts *with Rhode Island—including any Rhode Island-directed "deceptive marketing"*—are the "but for" or proximate cause of global climate change, much less the State's alleged injuries. Mot. to Compel Reply at 1 (The State contends that Defendants' "conduct in *and outside* Rhode Island . . . caused the State serious climate-related injuries.") (emphasis added).

The State dedicates a substantial portion of its motion to compel to disputing the arguments Defendants presented in their Rule 12(b)(2) motion regarding the causal standard. The State concedes that "[t]he relatedness prong incorporates a 'causative threshold,' which is something like a 'proximate cause' nexus." Mot. to Compel at 9 (citation omitted). But the State also claims that the standard is "flexible" and "relaxed," and suggests—contrary to current law—that it does not have to satisfy even the less rigid requirement of "but for" causation. *Id.* at 10.

The Rule 12(b)(2) motion and the motion to compel therefore present the same threshold issue: must the State demonstrate that Defendants' forum-related activities caused the State's alleged injuries and whether the State has or can plead allegations that satisfy that standard? This is precisely the issue raised in both *Ford Motor* and *Martins*.

***No Right to Personal Jurisdiction Discovery in the Absence of Disputed Jurisdictional Facts***. *Martins* presents a second issue that also is directly relevant to the motion to compel: When is it appropriate to "grant[] defendants' motion to dismiss for lack of personal jurisdiction while refusing to permit the plaintiff the opportunity for jurisdictional fact discovery?" In *Martins*, the trial court denied jurisdictional discovery because there was "no great deal of controversy surrounding the question of minimum contacts" against the Bridgestone entities, 2018 WL 1341662, at *14, and "our Supreme Court has been reluctant to allow litigants to engage in a discovery 'fishing expedition' merely to establish personal jurisdiction." *Id.* at *13. On appeal, the Rhode Island Supreme Court will consider the proper standard or burden a party must satisfy to obtain jurisdictional discovery, including whether the trial court was correct in denying discovery when it found jurisdictional facts were not disputed. *Id.* at *14. That is also a critical issue presented in the State's motion to compel here. Defendants demonstrate in their Objection that "[b]efore a 'plaintiff [is] permitted a limited right to engage in jurisdictional discovery,' the court must determine that 'pertinent facts bearing on the issue of jurisdiction are in question.'" Mot. to Compel Obj. at 5–6 (quoting *Smith v. Johns-Manville Corp.*, 489 A.2d 336, 340 (R.I. 1985); *Coia v. Stephano*, 511 A.2d 980, 984 (R.I. 1986)). Because Defendants' Rule 12(b)(2) motion accepts the factual jurisdictional allegations in the State's Complaint as true, no facts are "in question" and therefore the motion to compel should be denied. *Id.* at 1, 4–9. The State does not dispute that Defendants accept all jurisdictional facts as true. Mot. to Compel Reply at 3–4. The State argues, contrary to *Smith*, *Coia* and *Martins*, that whether jurisdictional facts are in dispute is irrelevant, and suggests that discovery is appropriate merely to provide a "more satisfactory showing of facts." *Id.* at 3. This newly minted position is inconsistent with the State's opening brief where it correctly noted that jurisdictional discovery is warranted only "'when pertinent facts bearing on the issue of jurisdiction are in question.'" Mot. to Compel. at 6 (quoting *Smith*, 489 A.2d at 340).

***Defendants Rule 12(b)(2) Motion and the State's Motion to Compel Should be Resolved Together***. If the Court defers Defendants' Rule 12(b)(2) motion, it should also defer the State's motion to compel for at least three reasons. First, decisions in *Ford Motor* and *Martins* confirming the State's obligation to demonstrate at least "but for" causation will defeat the State's request for jurisdictional discovery because no discovery could demonstrate that Rhode Island activities caused global climate change and the State's alleged injuries. Second, a decision in *Martins* confirming Judge Stern's denial of jurisdictional discovery when, as here, the uncontested jurisdictional allegations demonstrate a lack of specific jurisdiction will defeat the State's motion to compel. Third, in most instances Rhode Island trial courts determine whether to permit jurisdictional discovery as part of their consideration of the Rule 12(b)(2) motion. *See, e.g.*, *Coia*, 511 A.2d at 983; *Smith*, 489 A.2d at 340; *Martins*, 2018 WL 1341662, at *13, *16; *Ballew v. Olson Techs., Inc.*, No. C.A. PC 05-5108, 2006 WL 2971370, at *3 (R.I. Super. Oct. 17, 2006). This Court should do the same.

**<u>Question 3</u>: *What law do Defendants rely on to support their request that the Court hear the Rule 12(b)(6) motion first?***

No Rhode Island authority requires this Court to resolve personal jurisdiction issues before hearing the Rule 12(b)(6) motion. In fact, case law demonstrates that courts can address a Rule 12(b)(6) motion first and dismiss on the merits when it would be more efficient to do so. The Rhode Island Supreme Court has implicitly endorsed this approach. In *McBurney v. Jeremiah*, 735 A.2d 212 (R.I. 1999), the trial court dismissed plaintiff's complaint on several grounds: for lack of personal jurisdiction under Rule 12(b)(2), for failure to state a claim under Rule 12(b)(6), and for errors in service of process under Rule 12(b)(5) and Super. R. Civ. P. 41(b)(2). *See id.* The Supreme Court affirmed the dismissal on Rule 12(b)(6) grounds, without addressing Rule 12(b)(2) or the service of process questions. *Id.* at 213 (holding that the defendant, a divorce-court judge, was "entitled to judicial immunity" and therefore plaintiff could not state a claim). The Court thus tacitly confirmed that there is no obstacle to dismissing a case on Rule 12(b)(6) grounds without addressing personal jurisdiction. *Id.*

The First Circuit has expressed a similar view. In *Feinstein v. Resolution Tr. Corp.*, 942 F.2d 34 (1st Cir. 1991), "where subject matter jurisdiction was plain," the court stated that "we cannot fault the district court for eschewing difficult jurisdictional and venue-related issues in favor of ordering dismissal on the merits." *Id.* at 40; *see also N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale*, 567 F.3d 8, 12 (1st Cir. 2009) ("[W]here an appeal presents a difficult jurisdictional issue, yet the substantive merits underlying the issue are facilely resolved in favor of the party challenging jurisdiction, the jurisdictional inquiry may be avoided.") (citation omitted).[3]

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[3] While federal and state court cases typically prohibit deciding a Rule 12(b)(6) motion before determining *subject matter jurisdiction*, a court may decide a Rule 12(b)(6) motion before deciding *personal jurisdiction*. *See, e.g.*, *McBee v. Delica Co.*, 417 F.3d 107, 127 (1st Cir. 2005) (exercising "the power to pretermit the personal jurisdiction question" and dismiss on ground that plaintiff's "claim is ... without merit" and explaining personal jurisdiction is distinguishable from "subject matter jurisdiction ..., which goes to the fundamental institutional competence of the court"); *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 347-348 (2d Cir. 2018) (Calabresi, J., concurring) ("*Steel Co.* is

Here, the Court can hear the Rule 12(b)(6) motion now to promote efficiency and the wise use of judicial resources. *Ford Motor* will be argued in the October 2020 term; it is unlikely that the U.S. Supreme Court will issue a decision before December 2020, and possibly not until June 2021. The Rhode Island Supreme Court has invited further briefing on the *Ford Motor* decision, after which it will schedule *Martins* for oral argument. *See* Order, *Martins v. Bridgestone Americas Tire Ops. LLC*, No. SU-2018-143-A (Jan. 23, 2020). Thus, this Court likely will not have decisions in both *Martins* and *Ford Motor* for more than a year. Meanwhile, the Rule 12(b)(6) motion is fully briefed and it is ready to be heard. Hearing that motion now is consistent with Rule 1 of the Rhode Island Rules of Civil Procedure, which demands "the just, speedy, and inexpensive determination of every action" and with the parties' original agreement on the order of briefing. If the Court grants the Rule 12(b)(6) motion, the case will be dismissed.

**<u>Question 4</u>: *How are the specific proposed jurisdictional discovery requests necessary to resolve the Rule 12(b)(2) dispute? Is this a fishing expedition? Does the discovery really address matters in dispute?***

The State's proposed jurisdictional discovery is not necessary to resolve Defendants' Rule 12(b)(2) motion. Jurisdictional discovery is generally allowed only where a plaintiff has alleged sufficient jurisdictional facts, and those facts are *in dispute*. *See Smith*, 489 A.2d at 340; *Kroskob v. Avco Corp.*, C.A. No. 07-6435, 2009 R.I. Super. LEXIS 107 (R.I. Super. Ct. Aug. 20, 2009) (Gibney, J.). *Smith* makes clear that jurisdictional discovery should be granted only "where a controversy exists as to the defendant's contacts with Rhode Island." *Smith*, 489 A.2d at 340. In *Smith*, there was such a controversy, as the defendant submitted an affidavit disputing the jurisdictional facts asserted in the plaintiff's complaint. *Id.* at 337–38; *see also Surpitski v. Hughes-Keenan Corp.*, 362 F.2d 254, 255–56 (1st Cir. 1966). Here, Defendants did not submit a single affidavit contesting the jurisdictional allegations of the State's 315-paragraph Complaint. Indeed, Defendants have *accepted* the State's jurisdictional allegations *as true* for purposes of their Rule 12(b)(2) motion. Rule 12(b)(2) Mot. at 20, n.8. There is no factual dispute or controversy to be resolved through jurisdictional discovery, and thus jurisdictional discovery is neither necessary nor appropriate. For the same reasons, there is no need for the parties to meet and confer on specific jurisdictional discovery requests.

Further, the State has failed to demonstrate how jurisdictional discovery could be relevant to Defendants' Rule 12(b)(2) motion. The law requires the State to allege that Defendants' Rhode Island-related activities caused its alleged injuries. But the State's theory of the case is that its harms resulted from *global* climate change brought about by *worldwide* emissions of greenhouse gases including when fossil fuels, produced by Defendants and thousands of others around the world, were combusted by billions of businesses, governments, and individual consumers over several decades. Compl. ¶¶ 1, 3, 19. No amount of jurisdictional discovery will allow the State to show that Rhode Island activities caused its alleged injuries. In fact, the State's Complaint makes clear that the alleged harms were *not* caused by forum-related conduct, but instead were

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not controlling in cases of personal jurisdiction" and "the better course, in circumstances like those before us, is to assume personal jurisdiction arguendo and direct a dismissal with prejudice for failure to state a claim").

caused by the global phenomenon of climate change. Mot. to Compel Obj. at 4 (citing Compl. ¶¶ 37–46).

Jurisdictional discovery cannot be used to "engage in a 'fishing expedition'" to establish jurisdiction over a defendant when "there is an absence of any specific allegations that would support a finding of personal jurisdiction." *Coia*, 511 A.2d at 984. The State's proposed discovery seeks license to conduct such a fishing expedition.

Finally, as explained above, because the Rule 12(b)(2) motion and the motion to compel both implicate the required causal link between the forum activities and the injuries alleged, they should be heard together.

Very truly yours,

Gerald J. Petros

cc: All counsel of record



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