IN THE UNITED STATES DISTRICT COURT FOR THE THE DISTRICT OF MARYLAND (Northern Division)

Mayor and City Council of Baltimore Plaintiff, vs. BP p.l.c., et al. Defendants.	Case No.: 1:18-cv-2357-ELH

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO EXTEND THE STAY PENDING APPEAL

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I. INTRODUCTION

This Court's order granting the Mayor and City Council of Baltimore's motion to remand their global warming tort claims to state court should be stayed pending appeal because Defendants' appeal presents substantial legal questions on which Defendants are likely to succeed. (ECF No. 172, "Remand Order").[1] Defendants will be irreparably injured absent a stay because they will be deprived of the opportunity to meaningfully exercise their statutory right to appeal the Remand Order due to federal officer removal. *See* 28 U.S.C. §§ 1442, 1447(d); *Lu Junhong v. Boeing Co*., 792 F.3d 805, 811 (7th Cir. 2015) (Easterbrook, J.). Moreover, a stay will not injure Plaintiff, but will instead preserve the parties' resources, and promote judicial economy and the public interest by avoiding simultaneous litigation in both state and federal court.

In addition to this action, there are twelve similar cases pending in federal courts in California, Washington, New York, and Rhode Island in which various government entities have asserted state-law global warming claims against defendant companies in the fossil fuel industry.[2] All but one of those cases was removed from state court. The only other district court judge that has granted a remand motion stayed the remand pending appeal to ensure that the

[1] This Motion is submitted subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

[2] *See County of San Mateo v. Chevron Corp*., et al., No. 3:17-cv-04929-VC (N.D. Cal.); *City of Imperial Beach v. Chevron Corp., et al.,* No. 3:17-cv-04934-VC (N.D. Cal.); *County of Marin v. Chevron Corp., et al*., No. 3:17-cv-04935-VC (N.D. Cal.); *County of Santa Cruz v. Chevron Corp., et al.,* No. 3:18-cv-00450-VC (N.D. Cal.); *City of Santa Cruz v. Chevron Corp., et al*., No. 3:18-cv-00458-VC (N.D. Cal.); *City of Richmond v. Chevron Corp., et al*., No. 3:18-cv-00732-VC (N.D. Cal.); *City of Oakland v. BP P.L.C. et al.*, No. 3:17-cv-06011-WHA (N.D. Cal.); *City and County of San Francisco v. BP P.L.C. et al.*, No. 3:17-cv-06012-WHA (N.D. Cal.); *Pacific Coast Fed. of Fishermen's Ass'ns v. Chevron Corp. et al.*, No. 3:18-cv-07477 (N.D. Cal.); *State of Rhode Island v. Chevron Corp. et al*., No. 1:18-cv-00395-WES-LDA (D. R.I.); *King County v. BP P.L.C., et al.*, No. 2:18-cv-00758-RSL (W.D. Wash.); *City of New York v. BP P.L.C., et al.*, No. 1:18-cv-00182-JFK (S.D.N.Y.).

defendants' appellate rights were not rendered meaningless by intervening state court proceedings. As a result, *none* of these cases is currently proceeding in state court. This case should not be the first.

Defendants' appeal presents complex questions of subject matter jurisdiction, including whether Plaintiff's claims (1) necessarily arise under federal common law; (2) raise disputed and substantial federal questions; (3) are completely preempted; (4) involve conduct taken under the direction of federal officers and on federal enclaves and the Outer Continental Shelf, and (5) are within the district court's bankruptcy and admiralty jurisdiction. The federal common law ground for removal, in particular, raises serious legal questions about which reasonable jurists could disagree. In fact, they already have.

Defendants have argued in each of the pending global warming cases that claims based on the alleged effects of worldwide greenhouse gas emissions and fossil fuel production must be governed by federal common law. Two district court judges agreed, holding that global warming claims arise under federal law, regardless of whether the plaintiffs affix state law labels to their claims. *See California v. BP P.L.C.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) (Alsup, J.); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018) (Keenan, J.). Another district court judge held that plaintiffs' state law global warming claims were not governed by federal common law—and thus were not removable, *see County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) (Chhabria, J.). Here, the Court came to the same result as Judge Chhabria, though by a different route. *See* ECF No. 172 at 12-17 (describing Defendants' asserted ground for removal as a "preemption argument").

These divergent district court orders—all of which are now on appeal—confirm that a stay is warranted so that the Fourth Circuit can resolve this and other threshold jurisdictional

issues before the parties expend substantial time and resources litigating this case in state court. Indeed, although the two federal judges for the same California district court came to opposite conclusions on remand, both certified any issues not immediately appealable for interlocutory review, acknowledging the substantial grounds for disagreement. *See County of San Mateo v. Chevron Corp.*, No. 17-cv-04929, ECF No. 240 (Judge Chhabria staying the orders granting remand pending appeal and *sua sponte* certifying them for interlocutory review because removal arguments involved "controlling questions of law as to which there is substantial ground for difference of opinion"); *BP*, 2018 WL 1064293, at *5 (Judge Alsup denying motions to remand and *sua sponte* certifying order for interlocutory review, noting that "the issue of whether plaintiffs' nuisance claims are removable on the ground that such claims are governed by federal common law" is "a controlling question of law as to which there is substantial ground for difference of opinion"). The district court in California also stayed a follow-on case before any motion to remand was briefed, pending the outcome of the related appeals. *Pac. Coast Fed. of Fishermen's Ass'ns, Inc. v. Chevron Corp.*, No. 3:18-cv-07477-VC (N.D. Cal.), ECF No. 91.

This Court also should stay this action pending appeal. If the Court denies this Motion, however, Defendants request that the Court enter a temporary stay of the Remand Order to allow the Fourth Circuit to consider a motion to stay pending appeal pursuant to Rule 8(a)(2) of the Federal Rules of Appellate Procedure.[3]

II. ARGUMENT

District courts have inherent power to stay proceedings pending before them. *See Nken v. Holder*, 556 U.S. 418, 421 (2009); *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). This includes the authority to stay remand orders pending appeal. *See, e.g.*, *Northrop Grumman*, 2016

[3] The parties' have separately stipulated to extend the stay of the Remand Order until such time as this Court resolves Defendants' motion to stay (or for 14 days thereafter that date if the Court denies the motion).

WL 3346349 at *7 (granting motion to stay remand "until such time as Plaintiff's appeal of that Order is resolved"); *Brinkman v. John Crane, Inc.*, 2015 WL 13424471 (E.D. Va. Dec. 14, 2015) (staying remand order pending appeal).

Here, the Remand Order should be stayed pending appeal because (1) Defendants can make a strong showing that they are likely to succeed on the merits of their appeal; (2) Defendants will be irreparably injured absent a stay; (3) a stay will not substantially injure Plaintiff; and (4) the public interest favors a stay. *Nken*, 556 U.S. at 434; *see also Long v. Robinson*, 432 F.2d 977, 980 (4th Cir. 1970) (same four factors). "Since the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules," *Miller v. Brown*, 465 F. Supp. 2d 584, 596 (E.D. Va. 2006), *aff'd* 503 F.3d 360 (4th Cir. 2007), but the "first two factors . . . are the most critical." *Nken*, 556 U.S. at 434.

A. Defendants Are Likely to Succeed on the Merits of Their Appeal

To establish that they are "likely to succeed on the merits," Defendants do not have to demonstrate that success on appeal is more likely than not, but rather must "establish[] sufficiently that their appeal presents a substantial legal question on the merits." *Brinkman v. John Crane, Inc.*, 2015 WL 13424471, at *1 (E.D. Va. Dec. 14, 2015); *see also Washington Speakers Bureau v. Leading Authorities, Inc.*, 49 F. Supp. 2d 496, 499 (E.D. Va. 1999) (same).

Defendants' appeal presents substantial legal questions regarding whether this case was properly removed under the Federal Officer Removal Statute, for which Defendants have a statutory right of appeal. *See* ECF No. 1 at 1-2; 28 U.S.C. § 1442, § 1447(d) (an "order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title *shall be* reviewable by appeal or otherwise") (emphasis added); *see also Northrop Grumman Technical Servs., Inc. v. DynCorp Int'l, LLC*, 865 F.3d 181, 189 n.4 (4th Cir. 2017) ("[A]lthough orders remanding cases to state court generally are not reviewable on appeal, we

may review such an order when, as here, the removal was made pursuant to the federal officer removal statute, 28 U.S.C. § 1442."). Defendants' appeal also presents substantial legal questions on whether the case may be removed based on the federal common law and the other grounds raised in their Notice of Removal. *See Lu Junhong v. Boeing Co*., 792 F.3d 805, 811 (7th Cir. 2015) (Easterbrook, J.) ("[t]o say that a district court's 'order' is reviewable is to allow appellate review of the whole order, not just of particular issues or reasons"); *Wood v. Crane Co.*, 764 F.3d 316, 320 (4th Cir. 2014) ("Section 1447(d) explicitly refers to a 'case' removed from state court. Because this case was originally removed pursuant to the federal officer removal statute, we have jurisdiction."). A substantial question on the merits may arise where the case involves "complex questions and novel legal theories . . . [with] potentially large downstream precedential consequences," *Northrop Grumman*, 2016 WL 3346349 at *2, or questions of "first impression that touch[ ] on matters of substantial national importance." *Miller*, 465 F. Supp. at 596. As Judge Chhabria recognized in *County of San Mateo*, this case presents many such questions. *See County of San Mateo*, No. 17-cv-04929 (N.D. Cal.), ECF No. 223 (noting that plaintiffs' claims "raise national and perhaps global questions").[4]

[4] Plaintiff may argue that appellate review is limited only to the propriety of removal under the Federal Officer Removal Statute, but there is a Circuit split on this issue, which itself supports a stay. *See In re Cintas Corp. Overtime Pay Arbitration Litig.*, 2007 WL 1302496, at *2-3 (N.D. Cal. May 2, 2007) (granting stay where "there [was] a substantial circuit split on [a] jurisdictional issue"). The plain language of 28 U.S.C. § 1447(d) authorizes review of the "order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443," not a portion of the order. 28 U.S.C. § 1447(d) (emphasis added). *See Kircher v. Putnam Funds Trust*, 547 U.S. 633, 641 n.8 (2006) ("Congress has, when it wished, expressly made 28 U.S.C. § 1447(d) inapplicable to particular remand *orders*.") (emphasis added). Courts have interpreted this to permit the appellate court to review the entire remand order where the Federal Officer Removal Statute is one of the grounds for removal. *Compare Lu Junhong v. Boeing Co*, 792 F.3d 805, 811 (7th Cir. 2015) (Easterbrook, J.) ("[t]o say that a district court's 'order' is reviewable is to allow appellate review of the whole order, not just of particular issues or reasons"); *Mays v. City of Flint, Michigan*, 871 F.3d 437, 442 (6th Cir. 2017) (holding that where an "appeal of the remand order is authorized by 28 U.S.C. § 1447(d) because the . . . Defendant[]

At least some of the Defendants extracted, produced, and sold fossil fuels at the direction of federal officers. *See* Remand Order at 36-37; Opp. at 59-62. Although this Court concluded that Defendants "have not shown that a federal officer controlled their *total* production and sales of fossil fuels," Remand Order at 36 (emphasis added), other courts have held that the type of contractual obligations established by Defendants support federal officer removal. Opp. at 62 (discussing cases). *See, e.g.*, *Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705, 712 (E.D. Tex. 1998) (holding that the "nexus present during" the "ten years" plaintiff worked under federal direction was "sufficient to support § 1442(a)(1) removal" even though plaintiff alleged harm due to exposure to a chemical produced by the defendant over a 35 year period); *see also Lalonde v. Delta Field Erection*, 1998 WL 34301466 (M.D. La. Aug. 6, 1998) (holding the defendant's work under the direction of the government for eleven years established a "causal connection" between the claims and the defendants' conduct, notwithstanding the two decades during which the defendant was not acting under the control of a federal officer). The fact that Defendants conducted *some* of their extraction activities outside the control of federal officers

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removed the case under 28 U.S.C. § 1442," the court's "jurisdiction to review the remand order also encompasses review of the district court's decision on . . . alternative ground[s] for removal [such as] 28 U.S.C. § 1441"); *Decatur Hospital Auth'y v. Aetna*, 854 F.3d 292, 296 (5th Cir. 2017) ("Like the Seventh Circuit, '[w]e take both Congress and Kircher at their word in saying that, if appellate review of an 'order' has been authorized, that means review of the 'order.' Not particular reasons for an order, but the order itself."), *with Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976) ("Jurisdiction to review remand of a § 1441(a) removal is not supplied by also seeking removal under § 1443(1)."); *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012); *Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *State Farm Mut. Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 96 (2d Cir. 1981) (per curiam). Indeed, this issue is pending before the Ninth Circuit in the related global warming actions. *See County of San Mateo, et al., v. Chevron Corp., et al.*, Nos. 18-15499 (9th Cir.), ECF No. 77 at 19-26. As Defendants have argued there, *Noel*, like all but one of the cases on its side of the split, predated the Removal Clarification Act of 2011, which first authorized appellate review of cases removed under § 1442, and did not have the benefit of Judge Easterbrook's in-depth analysis in *Lu Junhong*.

does not necessarily preclude the requisite "causal nexus" between Plaintiff's alleged injuries and the conduct Defendants undertook at the direction of federal officers.

This Court also held that federal officer removal was improper because the government did not direct Defendants "to conceal the hazards of fossil fuels or prohibit[] them from providing warnings to consumers." Remand Order at 36. But Plaintiff's nuisance claims turn on Defendants' fossil-fuel *production*, and there is, at minimum, a serious legal question as to whether removal is proper where one of the primary "acts for which [Defendants] have been sued," Remand Order at 37—*i.e.*, fossil-fuel production—was taken under the authority of federal officers.

There is also a substantial legal question regarding this Court's holding that Plaintiff's global warming nuisance claims do not arise under federal common law. Two district courts analyzing virtually identical claims and allegations have recently reached the opposite conclusion. *See BP*, 2018 WL 1064293, *5 ("well-pleaded complaint rule does not bar removal of these actions" because "the claims necessarily arise under federal common law"); *City of New York*, 325 F. Supp. 3d at 472 ("[T]he City's claims . . . arise under federal common law and require a uniform standard of decision"). And a third district court that remanded similar global warming claims stayed the remand orders pending appeal and *sua sponte* certified them for interlocutory review because it recognized that the defendants' removal arguments involved "controlling questions of law as to which there is substantial ground for difference of opinion." *County of San Mateo*, No. 17-cv-04929 (9th Cir.), ECF No. 240. These conflicting decisions—

which are currently being reviewed by the Second and Ninth Circuits—confirm that Defendants' appeal presents serious legal questions about which reasonable jurists can obviously disagree.[5]

Indeed, in his decision in *County of San Mateo*, granting plaintiffs' motion to remand, Judge Chhabria did *not* conclude, as this Court did, that Defendants' removal arguments were barred by the well-pleaded complaint rule. Rather, he remanded because he understood *AEP*'s displacement holding to mean that "federal common law does *not* govern" the claims. *County of San Mateo*, 294 F. Supp. 3d at 937. In concluding that the well-pleaded complaint rule barred removal even if Plaintiff's global warming claims were governed by federal common law, this Court's reasoning differed from all previous district court decisions addressing this issue.

There is no question that Defendants have, at minimum, "demonstrated a 'substantial case on the merits.'" *Miller*, 465 F. Supp. 2d at 596. As this Court acknowledged, Judge Alsup's "reasoning [in *BP*] was well stated and presents an appealing logic." Remand Order at 15; *see United States v. Fourteen Various Firearms*, 897 F. Supp. 271, 271 (E.D. Va. 1995) (although disagreeing with a case that reached the opposite conclusion, finding likelihood of success because "that case was thoughtfully decided and reasonable minds could differ respecting whether it or the decision now on appeal.") Moreover, in "declining to endorse" removal based on the federal common law, this Court recognized "the absence of any controlling

[5] The Remand Order cites *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998), but that case dealt with the scope of complete preemption under the False Claims Act ("FCA"). The defendant argued that state-law claims alleging deceptive billing practices were governed by federal common law interpreting the FCA, but the court held that the FCA "does not indicate a *uniquely* federal interest, of the scope required for the application of federal common law, in preventing a carrier from misrepresenting the nature of its rates to its customers." *Id.* at 54. The doctrine of complete preemption provided the proper framework in that context because deceptive billing claims have traditionally been resolved under state law and thus could only arise under federal law as the result of a federal statute. Interstate pollution claims, by contrast, present *inherently* federal issues that must be "resolved by reference to federal law" regardless whether Congress has spoken to the issue. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987).

authority." Remand Order at 17. Accordingly, Defendants have shown a "substantial case on the merits" as "this case raises a number of complex questions and novel legal theories which the Fourth Circuit has yet to evaluate, and the case has potentially large downstream precedential consequences." *Northrop*, 2016 WL 3346349, at *3; *see Goldstein v. Miller*, 488 F. Supp. 156, 175 (D. Md. 1980) (granting stay where "there is little doubt that at least some of the issues raised in these cases present serious questions of first impression").

Defendants' other grounds for removal likewise present substantial legal questions.

First, Defendants have a substantial argument that Plaintiff's claims were properly removed under the Outer Continental Shelf Lands Act ("OCSLA")—an argument bolstered by the Supreme Court's broad construction of OCSLA in *Parker Drilling Management Services, Ltd. v. Newton*, ---U.S.----, 2019 WL 2412907 (June 10, 2019), issued the same day as this Court's Remand Order. Plaintiff seeks to hold Defendants liable for any exploration and production of minerals on the OCS, where a significant portion of domestic fossil-fuel extraction occurs. In *Parker Drilling*, the Supreme Court affirmed the primacy of federal law on the OCS: "Under the OCSLA, all law on the OCS is federal law." *Id.* at *7. Indeed, as the Court recognized, "[t]he OCSLA denies States *any* interest in or jurisdiction over the OCS." *Id.* at *2 (emphasis added). Critically, the Court explained that the choice-of-law "question under the OCSLA" is not one of "ordinary preemption." *Id.* at *8.

Plaintiff disputes OCSLA jurisdiction on the theory that extraction on the OCS was not the but for cause of their injuries, but courts have allowed removal where a defendant's OCS operations merely *contributed* to the plaintiff's alleged injuries. *See Ronquille v. Aminoil Inc.*, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014) (removal proper where "at least part of the work that Plaintiff allege[d] caused his exposure to asbestos arose out of or in connection with

Shell's OCS operations"). Moreover, the relief Plaintiff seeks—abatement of the alleged nuisance of oil and gas production—"threatens to impair the total recovery of the federally-owned minerals" from the OCS. *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 570 (5th Cir. 1994); *see also United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990) (applying "total recovery" test). There is a serious legal question as to whether OCSLA removal is proper under either the "but for" or "total recovery" tests, particularly given congressional intent to maintain OCSLA's exclusive jurisdictional regime. *Parker Drilling*, 2019 WL 2412907, at *3.

Second, there is a legitimate issue as to whether Plaintiff's claims necessarily raise disputed and substantial federal issues under the "common-sense" inquiry set forth in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312-13 (2005). Plaintiff's nuisance claim requires a determination as to the "reasonableness" of Defendants' conduct, but federal law necessarily governs the "cost-benefit analysis required by Plaintiff's nuisance claims." Opp. at 31, 34. The Fifth Circuit recently held that claims similarly challenging existing regulations gave rise to federal jurisdiction. *See Bd. of Comm'rs v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 721, 725–26 (5th Cir. 2017). Reasonable jurists could disagree about whether Plaintiff's claims are removable under *Grable*.

Finally, the other removal grounds asserted by Defendants also raise substantial questions. Some of the allegedly tortious activity—fossil-fuel extraction—indisputably occurred on federal enclaves. *See* Opp. at 53-54. Although some courts have concluded federal enclave jurisdiction exists only where *all or most* of the pertinent events occurred on federal enclaves, Remand Order at 30, others have concluded that federal enclave jurisdiction can lie when only a *portion* of the pertinent events occurred on federal enclaves. *See* Opp. at 54-55 (citing cases).

There also is a substantial question whether Plaintiff's claims are completely preempted by the CAA. *See* Opp. at 45-46. In rejecting complete preemption, this Court noted that the CAA's savings clause "specifically preserves other causes of action," and thus "demonstrates that Congress did not intend the federal causes of action under the [CAA] to be exclusive." Remand Order at 26. But the CAA's cooperative federalism approach allows states to establish standards applicable *within their own boundaries*—it could not preserve the authority of any state to regulate nationwide emissions, because no state has ever had that authority. Opp. at 46-47.[6] In addition, reasonable jurists could disagree as to whether Plaintiff's claims have a "close nexus" to one or more confirmed bankruptcy plans, including Texaco's. Opp. at 65–66; *see also In re Wilshire Courtyard*, 729 F.3d 1279, 1289 (9th Cir. 2013). There is also a substantial legal question as to whether the City can invoke the public safety exception to the bankruptcy removal statute when it is demanding billions of dollars in compensatory damages for conduct which has been authorized and encouraged by federal and state law for decades. *See* Compl. ¶ 247; *id.*, Prayer for Relief. And, reasonable jurists could dispute whether a plaintiff alleging that worldwide fossil-fuel production is the proximate cause of its alleged injuries, Compl. ¶ 10, can avoid admiralty jurisdiction on the ground that the substantial portion of that production conducted by vessels on navigable waters is *not* the proximate cause of its injuries. *See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

[6] The Sixth Circuit's decision in *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989) (cited at Remand Order at 26-27), involved an effort under Michigan law to impose pollution requirements on a garbage incineration plant in Detroit, Michigan more stringent than those required by the relevant federal permit. The court held that plaintiff's state law claims were not preempted because the CAA's savings clause indicated that Congress did not intend to completely preempt such claims. *Id.* at 342-44. But the plaintiff in that case sought to use state law to challenge in-state emissions, whereas here Plaintiff is not attempting to limit in-state emissions in Maryland, but to punish Defendants for their nationwide—and worldwide—operations and the resulting worldwide greenhouse gas emissions.

B. Defendants Will Be Irreparably Harmed If The Remand Is Not Stayed

Defendants' right to appeal the Remand Order will be meaningless if this Court declines to stay this action pending appeal. Once the remand takes effect—*i.e.*, after the Clerk of Court mails the certified copy of the Remand Order to the Circuit Court for Baltimore City—"the State Court may thereupon proceed with [the] case." 28 U.S.C. § 1447(c). "Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court *before* it becomes irrevocable." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (emphasis added). But without a stay, the state court could reach a final judgment before Defendants' appeal is resolved. *Northrop Grumman*, 2016 WL 33436349, at *4 (defendant would suffer "severe and irreparable harm if no stay is issued" because an "intervening state court judgment or order could render the appeal meaningless"); *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng's*, 2010 WL 11565166, at *4 (S.D.W. Va. May 4, 2010) (finding that because "remand . . . would, as a practical matter, moot [defendants'] respective appeals . . . denial of the [defendants'] appellate rights constitutes a sufficient substantive loss to tip the balance in favor of a stay"); *Hiken v. Dep't of Defense*, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (balance of hardship tipped in favor of granting stay because right to appeal an order to disclose information "would become moot" in the absence of a stay); *CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC*, 2013 WL 3288092, at *7 (E.D.N.C. June 28, 2013) ("[L]oss of appellate rights alone constitutes irreparable harm.").

Even if the state court does not enter final judgment before this appeal is resolved, this Court would have to untangle any state court rulings made during the pendency of the appeal if the Fourth Circuit reverses. *See Northrop Grumman*, 2016 WL 3346349, at *4. This would create a "rat's nest of comity and federalism issues." *Id.* Courts routinely grant motions to stay remand orders to avoid this exact risk. *See e.g., id*. at *3 (collecting cases); *Raskas v. Johnson &*

Johnson, 2013 WL 1818133, at *2 (E.D. Mo. April 29, 2013) (staying remand order due to risk of "inconsistent outcomes if the state court rules on any motions while the case is pending" on appeal); *cf. Pagliara v. Fed. Home Loan Mortg. Corp*., 2016 WL 2343921, at *3 (E.D. Va. May 4, 2016) (granting stay to avoid "potential hardship of duplicative and inconsistent" discovery obligations).

Requiring Defendants to litigate in state court while the question of jurisdiction is still being decided also would undermine the right to a federal forum provided under the federal officer removal statute. *See Decatur*, 854 F.3d at 295-96 (noting that Congress intended federal officer removal to "provid[e] federal jurisdiction for claims asserted against federal officers and parties acting pursuant to the orders of a federal officer"); *Northrop Grumman*, 2016 WL 3346349, at *4 ("Several other courts have recognized that where the pending appeal addresses remand of a case initially removed pursuant to 28 U.S.C. § 1442, a stay is appropriate to prevent rendering the statutory appeal right 'hollow'"). Moreover, federal courts are uniquely qualified to address issues implicating federal interests like those raised here. *See Grable*, 545 U.S. at 312 (recognizing "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues").

An immediate remand also would force Defendants—and Plaintiff—to spend substantial time and money litigating in state court. The litigation costs Defendants will incur in state court proceedings cannot be recovered if the Fourth Circuit reverses, thus these costs constitute irreparable injury. *See Citibank, N.A. v. Jackson*, 2017 WL 4511348, at *2-3 (W.D.N.C. Oct. 10, 2017) (granting motion to stay remand and noting that litigation costs would be avoided); *Mountain Valley Pipeline, LLC v. Simmons*, 307 F. Supp. 3d 506, 526-528 (N.D.W. Va. 2018) (noting that "not be[ing] able to recover . . . losses in this or any other litigation . . . weighs in

favor of finding irreparable harm," and that even the ability to "mitigat[e] . . . unrecoverable losses does not render them irrelevant" to an irreparable harm analysis); *cf. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004) (noting that financial costs imposed by government action can constitute irreparable harm); *Gold Gate Rest. Ass'n v. City & Cty. of S.F.*, 512 F.3d 1112, 1125 (9th Cir. 2008) (considering "otherwise avoidable financial costs" in irreparable harm analysis).

A stay is necessary here to ensure that Defendants' right to appeal is not rendered meaningless by intervening state court proceedings.

C. The Balance of Harm Tilts Decisively In Defendants' Favor

"Where, as here, the Government is the opposing party," the third and fourth stay factors (*i.e.*, harm to opposing party and the public interest) "merge" and should be considered together. *Nken,* 556 U.S. at 435; *see also Mayor & City Council of Baltimore v. Azar*, 2019 WL 2298808, at *12 (D. Md. May 30, 2019). Here, a stay would not prejudice Plaintiff's ability to seek damages or other relief or meaningfully exacerbate Plaintiff's injuries. Indeed, according to Plaintiff, the harm is already "locked in" and will occur in the future "even in the absence of any future emissions." *See, e.g.* Compl. ¶¶ 7-8, 179-180, 196. A stay would also benefit Plaintiff by avoiding costly and potentially wasteful state court litigation should the Fourth Circuit ultimately conclude that this action belongs in federal court. *See Brinkman*, 2015 WL 13424471, at *1 (granting stay pending appeal where failure to do so would cause both parties to "face the burden of having to simultaneously litigate [the case] in state court and on appeal to the [Fourth Circuit]") (internal quotation marks omitted)); *Fourteen Various Firearms*, 897 F. Supp. at 273 ("[W]here the failure to enter a stay will result in a meaningless victory in the event of appellate success, the . . . court should enter a stay of its order."). If Plaintiff is correct that these suits

belong in state court, "a stay w[ill] not permanently deprive [them] of access to state court." *Northrop Grumman*, 2016 WL 3346349, at *4. Proceedings will be delayed only briefly; pursuant to the Fourth Circuit's Briefing Order, the appeal will be fully briefed no later than September of this year. *Mayor & City Council v. BP p.l.c.*, 19-1644 (4th Cir. June 18, 2019), Doc. 3. Plaintiff's claimed ability to obtain the relief it seeks will not be prejudiced by that limited delay.

A stay while the appeal is pending would also "conserve[e] judicial resources and promot[e] judicial economy" by unburdening the state court of potentially unnecessary litigation. *See United States v. 2366 San Pablo Ave.*, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015) (finding "a cognizable public interest in promoting judicial economy"); *Scott v. Family Dollar Stores, Inc.*, 2016 WL 4267954, at *1 (W.D.N.C. Aug. 11, 2016) (granting a stay based on judicial economy); *North Carolina v. Dep't of Health, Ed., & Welfare*, 480 F. Supp. 929, 940 n.8 (E.D.N.C. 1979) (noting that "judicial economy may dictate a stay"); *Citibank, N.A. v. Jackson*, 2017 WL 4511348, at *3 (W.D.N.C. Oct. 10, 2017). A stay is thus in the public interest.

If the Court denies this Motion, Defendants alternatively request that the Court enter a temporary stay of the Remand Order to allow the Fourth Circuit to consider a Motion to Stay Pending Appeal pursuant to Fed. R. App. P. 8(a)(2). *See Condon v. Haley*, 21 F. Supp. 3d 572, 588-89 n.15 (D.S.C. 2014) (denying motion to stay pending appeal, but granting stay "to allow the Fourth Circuit to receive Defendant's . . . petition for an appeal stay and to consider that request in an orderly fashion" to ensure that "this court's colleagues on the Fourth Circuit [have] a reasonable opportunity to receive and consider Defendant['s] anticipated petition"); *Columbus-Am. Discovery Grp. Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 795 F. Supp. 2d 397, 401-02 (E.D. Va. 2011) (granting similar stay).

III. CONCLUSION

For these reasons, Defendants respectfully request that the Court extend the stay of the Remand Order pending resolution of the appeal to the Fourth Circuit. Alternatively, Defendants request that the Court enter a further temporary stay to allow time for the Fourth Circuit to hear a motion to stay pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of June 2019, the foregoing document was filed through the ECF system and was therefore served on all registered participants identified on the Notice of Electronic Filing.

/s/ Ty Kelly
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