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

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO EXTEND THE STAY PENDING APPEAL

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I. INTRODUCTION

Defendants have clearly established the requirements for a stay. Defendants' appeal addresses complex issues of federal jurisdiction that have divided district courts across the country—the very definition of "substantial legal questions." Plaintiff argues Defendants have not presented "new" arguments or "intervening law." Opp. 8-9. But the law does not require the moving party to meet such a standard. This is not a motion for reconsideration, and the Court need not reverse its decision as a predicate to concluding that Defendants' appeal presents substantial legal questions warranting appellate review.

Plaintiff contends that most of the jurisdictional issues addressed in the Court's Remand Order are unreviewable, but there is a well-developed circuit split on that issue, and the 40-year-old circuit precedent Plaintiff relies on cannot be reconciled with the plain text of 28 U.S.C. § 1447(d), including Congress's recent amendments to the statute, or with intervening Supreme Court precedent. If anything, Plaintiff's argument raises a thorny issue of appellate jurisdiction—which is also before the United States Court of Appeals for the Ninth Circuit and may require resolution by the United States Supreme Court—and confirms the necessity of a stay.

Plaintiff's irreparable harm arguments are unavailing. Without a stay, the parties will litigate a complex set of motions to dismiss in state court, all of which would need to be re-litigated under the federal rules if the case returns to federal court after appeal. Although Plaintiff contends discovery will proceed regardless of whether the case is in state or federal court, discovery in this Court will not commence until a scheduling order is issued, LR 104.4, which, in practice, does not customarily occur until after Rule 12 motions are resolved. A stay is thus warranted to prevent Defendants' appeal from being overtaken by state-court litigation and

rendered ineffective—as well as to prevent needlessly expending substantial sums of money and wasting limited judicial resources.

Finally, although Plaintiff complains about delay, it identifies *no* harm that will result during a brief stay pending appeal. A stay would simply preserve the status quo until the United States Court of Appeals for the Fourth Circuit decides where these claims should be litigated. Because all of the relevant factors strongly support a stay, this Court should grant Defendants' Motion to Extend the Stay Pending Appeal.

II. ARGUMENT

The Remand Order should be stayed pending appeal because (1) Defendants 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) a stay is in the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009).[1]

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

To show likely success on the merits, Defendants need only "establish[] … 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). The likelihood of success factor is thus satisfied when, as here, "there is a distinct possibility a panel of judges on the Fourth Circuit may reach a different conclusion than this Court has on some of [these] difficult

[1] Plaintiff contends that the test for granting a stay, articulated in *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970), was modified by *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7 (2008), as noted in *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342 (4th Cir. 2016). Opp. 3-4 n.2. As Plaintiff acknowledges, however, the "tests largely overlap." *Id.* Moreover, Plaintiff contends that the last two factors differ under *Long* and *Winter*, but the Supreme Court has held that those two "factors merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. And whether the Court evaluates the "public interest" or the "balance of equities," Defendants have satisfied their burden of showing that a stay is warranted here.

issues." *Zhenli Ye Gon v. Holt*, 2014 WL 202112, at *1 (W.D. Va. Jan. 17, 2014). That standard is met here.

1. The Entire Remand Order Is Reviewable On Appeal.

Plaintiff contends that the Fourth Circuit only has jurisdiction to review federal officer removal under 28 U.S.C. § 1442. Opp. 3 (citing 28 U.S.C. § 1447(d)). But the text of 28 U.S.C. § 1447(d) does not impose any such limit on appellate review. On the contrary, the text unambiguously authorizes review of "an *order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title." § 1447(d) (emphasis added). As the Seventh Circuit explained in a well-reasoned opinion by Judge Easterbrook, "[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." *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015). "[W]hen a statute provides appellate jurisdiction over an order, 'the thing under review is the order,' and the court of appeals is not limited to reviewing particular 'questions' underlying the 'order.'" *Id.*

The Seventh Circuit further noted that, "[i]f we go beyond the text of § 1447(d) to the reasons that led to its enactment, we reach the same conclusion." *Id.* at 813. Section 1447(d) "was enacted to prevent appellate delay in determining where litigation will occur," "[b]ut once Congress has authorized appellate review of a remand order—as it has authorized review of suits removed on the authority of § 1442—a court of appeals has been authorized to take the time necessary to determine the right forum." *Id.* In such cases, "[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Id.*

The Sixth Circuit similarly held that where an "appeal of the remand order is authorized by 28 U.S.C. § 1447(d) because the … Defendant[] 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." *Mays v. City of Flint, Mich.*, 871 F.3d 437, 442 (6th Cir. 2017) (citing *Lu Junhong*, 792 F.3d at 811-13).[2] The leading treatise on federal jurisdiction agrees that appellate review of a remand order made reviewable under § 1447(d) "should … be extended to all possible grounds for removal underlying the order. Once an appeal is taken there is very little to be gained by limiting review[.]" 15A Wright *et al*., Fed. Prac. & P. § 3914.11 (2d ed.).

Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199 (1996), is in accord. In *Yamaha*, the Supreme Court held that when an order is certified for interlocutory review under 28 U.S.C. § 1292(b), "appellate jurisdiction applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Id.* at 205. As a result, "the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Id.* (quoting 9 J. Moore & B. Ward, Moore's Fed. Prac. ¶110.25[1], p. 300 (2d ed. 1995)) (emphasis in original).

Plaintiff incorrectly asserts that this reading of § 1447(d) is foreclosed by *Noel v. McCain*, 538 F.2d 633 (4th Cir. 1976). Opp. 5. *Noel* did not address the scope of appellate jurisdiction in cases removed under § 1442. That is because, like the Ninth Circuit decision

[2] *See also Decatur Hospital Authority v. Aetna Health, Inc.*, 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.") (quoting *Lu Junhong*, 792 F.3d at 812); *but see City of Walker v. Louisiana*, 877 F.3d 563, 566 n.2 & n.4 (5th Cir. 2017) (reading *Decatur* narrowly in a case where the appellants did "not argue that the § 1447(d) exception for federal officer jurisdiction allow[ed] [the court] to review the entire remand order").

Plaintiff cites, *id.*,[3] *Noel* predates the Removal Clarification Act of 2011, which first authorized appellate review of cases removed under § 1442.[4] Pub. L. No. 112-51, §125 Stat. 545, 546 (Before 2011, § 1447(d) authorized appellate review of remand orders only in cases removed pursuant to § 1443.). The fact that Congress retained § 1447(d)'s reference to reviewable "orders"—after *Yamaha*'s holding that appellate jurisdiction applies to entire orders, not particular questions—confirms that Congress intended to authorize plenary review of such orders. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 697-98 (1979) ("[W]e are especially justified in presuming both that [Congress was] aware of the prior interpretation of Title VI and that that interpretation reflects [its] intent with respect to Title IX.").

Thus, the Fourth Circuit is likely to conclude that *Noel* does not control and § 1447(d) authorizes appellate review of the entire remand "order." An earlier decision similar to *Noel* did not prevent the Sixth Circuit from recently holding that a court may review an entire order removed under § 1442. *Compare Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970), with *Mays*, 871 F.3d at 442. Like the Sixth Circuit, the Fourth Circuit could choose to depart from outdated Fourth Circuit authority in light of § 1447's amendment and subsequent federal appellate and Supreme Court precedent. *See, e.g.*, *Yamaha*, 516 U.S. at 205; *Lu Junhong*,

[3] Plaintiff cites *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006), Opp. 5, but whether *Patel* limits the scope of appellate review in cases removed under § 1442 is the subject of the pending appeals in *County of San Mateo v. Chevron Corp.*, No. 18-15499 (9th Cir.), consolidated with Nos. 18-15502, 15503, and 18-16376. As defendants in those appeals have explained, "the question of whether § 1447(d) authorizes review of the whole order when a case is removed under § 1442(a) was neither presented nor decided" in *Patel*. *County of San Mateo*, No. 18-15499, ECF No. 77 at 14.

[4] Plaintiff also cites *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012), which does post-date the Removal Clarification Act. Opp. 5. As, the Seventh Circuit concluded, however, *Jacks* should be given little weight because it cited "nothing" to support its holding, and neither party in that case "cited authority or made a coherent argument." *Lu Junhong*, 792 F.3d at 805 (distinguishing *Jacks*, 701 F.3d at 1229).

792 F.3d at 812. Indeed, the very case *Noel* relied on for its ruling is the same decision that the Sixth Circuit departed from in *Mays*. *See Noel*, 538 F.2d at 635 (citing *Appalachian Volunteers*, 432 F.2d at 534).

Given the likelihood that the Fourth Circuit will revisit *Noel*, the deep circuit split on the proper interpretation of § 1447(d) supports a stay. *See In re Cintas Corp. Overtime Pay Arbitration Litig.*, 2007 WL 1302496, at *2-3 (N.D. Cal. May 2, 2007) (stay is appropriate when the "challenged decision conflicts with the decisions of several other courts"); *APCC Servs., Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 107 (D.D.C. 2003) ("A substantial ground for dispute also exists where a court's challenged decision conflicts with decisions of several other courts.").

2. Defendants Have Demonstrated a Likelihood of Success on the Merits.

Plaintiff's principal argument is that Defendants cannot show a likelihood of success on the merits because their motion "adds no authority not already considered by the Court." Opp. 12; *see also id.* 7-9. That is not the standard. Nor should it be, as such a rule would make it virtually impossible for parties to obtain a stay pending appellate review.

Also, it is irrelevant that this Court "rejected every argument in support of federal subject matter jurisdiction." *Id.* 1. "The likelihood-of-success standard does not mean that the trial court needs to change its mind or develop serious doubts concerning the correctness of its decision in order to grant a stay pending appeal." *Goldstein v. Miller*, 488 F. Supp. 156, 172 (D. Md. 1980), *aff'd*, 649 F.2d 863 (4th Cir. 1981). Rather, "tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Ohio Valley Envtl. Coal. v. United States Army Corps of Engineers*, 2010 WL 11565166, at *2 (S.D. W.Va. May 4, 2010); *see also Willcox v. Stroup*, 358 B.R. 835, 838 (D.S.C. 2006) (granting stay "in no way implies that the court doubts the correctness of its order," but signifies that "the case presents serious, substantial

and difficult issues of first impression that are a 'fair subject for appellate argument'"); *Goldstein*, 488 F. Supp. at 172 ("a stay may be appropriate in a case where … the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear"); *Holt*, 2014 WL 202112, at *1 (staying case where "the law on at least some of [the] issues is unsettled or is not subject to any recent authority directly on point"); *In re Hoekstra*, 268 B.R. 904, 906 (Bankr. E.D. Va. 2000). In short, the Court's level of confidence in the correctness of its Remand Order is immaterial.

Here, the Court's 46-page Remand Order addressed numerous complex jurisdictional issues that have divided federal courts across the country. *See California v. BP P.L.C.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018); *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018); *State of Rhode Island v. Chevron Corp.*, No. 18-395, ECF No. 122 (D. R.I. July 22, 2019). That split of authority alone demonstrates that Defendants' appeal presents substantial legal questions. But even setting aside those out-of-circuit decisions, Defendants have a "substantial case on the merits" because "this case is one of first impression that touches on matters of substantial national importance.[]" *Project Vote/Voting for Am., Inc. v. Long*, 275 F.R.D. 473, 474 (E.D. Va. 2011).

a. Federal Officer Removal

Plaintiff contends that Defendants show no substantial legal question on federal officer removal because Defendants offer "arguments and facts already considered and rejected by this Court." Opp. 7. But Defendants can establish a likelihood of success on the merits by making "a reasonable argument that the Fourth Circuit may reverse [the Court's] decision," even where they "rely on documents previously filed in this action [and] properly invoke[] the legal reasoning and authority contained [therein]." *Ohio Valley*, 2010 WL 11565166, at *3. Although

this Court rejected federal officer removal, Defendants have certainly offered "a reasonable argument" that the Fourth Circuit could reach a different conclusion.

The Court assumed that Defendants satisfy the first and second prongs of the federal officer removal test—*i.e.*, that some Defendants acted under federal officers and Defendants have colorable federal defenses—but it rejected federal officer removal on the third prong, holding that the charged conduct did not "relate to" an act under color of federal office. ECF No. 182 at 36. The Court held that the required nexus was missing because there was "no indication that the federal government directed them to conceal the hazards of fossil fuels or prohibited them from providing warnings to consumers." *Id.* (quoting 28 U.S.C. § 1442(a)(1)). Regardless whether that conclusion is correct, there is a substantial legal question as to whether Defendants can satisfy the "causal connection test." *Id.* at 36-37.

Consistent with the Supreme Court's admonition that "the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1),'" *Arizona v. Montgomery*, 451 U.S. 232, 242 (1981), the "hurdle erected by [the causal-connection] requirement is quite low." *In re Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017). As the Fourth Circuit has explained, the nexus requirement does not demand "a showing of a specific government direction"—*i.e.*, that the government directed the defendant to take all of the allegedly tortious actions. *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017). Rather, the defendant must show "only that the charged conduct *relate* to an act under color of federal office." *Id.* (holding removal was proper because plaintiff's failure-to-warn "claims undoubtedly 'relate to' all warnings, given or not, that the Navy determined in its discretion") (emphasis in original).

Here, Plaintiff asserts a claim for "Strict Liability—Design Defect" on the ground that "Defendants … extracted, refined, formulated, designed, packaged, [and] distributed … fossil fuel products," and that those "fossil fuel products have not performed as safely as an ordinary consumer would expect them to." Compl. ¶¶ 251, 253. This claim does not turn on whether any federal officers directed Defendants to make "boardroom decisions to withhold information about the dangers inherent in their products." Opp. 8. On the contrary, "[t]he relevant inquiry in a strict liability action focuses not on the conduct of the manufacturer but rather on the product itself." *Phipps v. Gen. Motors Corp.*, 278 Md. 337, 344, 363 A.2d 955, 958 (1976). Because federal officers directed certain Defendants to extract the very "product" Plaintiff claims is defective, Defendants have a colorable argument that the charged conduct relates to acts taken under federal control.

The Court also rejected any causal nexus on the ground that federal officers did not control Defendants' "total production and sales of fossil fuels." ECF No. 182 at 36. But other courts have found a causal nexus when federal officers controlled only part of the alleged tortious conduct. Mot. 6 (citing *Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705, 712 (E.D. Tex. 1998); *Lalonde v. Delta Field Erection*, 1998 WL 34301466 (M.D. La. Aug. 6, 1998)). Plaintiff contends that these cases are inapposite because Defendants "failed to establish the requisite nexus between federal control and the City's claims during *any* period." Opp. 8. But Plaintiff does not cite any authority suggesting that the causal nexus inquiry turns on the *duration* of federal control. And Plaintiff's theory of causation seeks to impose liability because fossil-fuel extraction and production—including the portion extracted and produced under federal control—*contributes* to global warming. *See* Compl. ¶ 219. Given Plaintiff's theory of causation, there is

at least a substantial question as to whether the alleged conduct "relates to" acts taken under color of federal office.

b. Federal Common Law

Plaintiff cannot (and does not) dispute that three other district courts have reached different conclusions on whether global warming-based tort claims arise under federal common law, even when nominally pleaded under state law. Plaintiff instead insists that a stay should be denied because Defendants have not presented any "intervening law" casting doubt on this Court's conclusion. Opp. 8-9. But that is, again, irrelevant. What *is* relevant is that two district courts have concluded, before Plaintiff filed this action, that nearly identical global-warming claims necessarily "arise under federal common law." *BP*, 2018 WL 1064293, at *5; *City of New York*, 325 F. Supp. 3d at 472 (same). And although a third district court addressing similar claims granted plaintiffs' motions to remand, that court did not invoke the well-pleaded complaint rule, as this Court did, but rather concluded that global warming claims are not governed by federal common law because the Clean Air Act has displaced it. *See County of San Mateo*, 294 F. Supp. 3d at 937. And both the *BP* and *San Mateo* courts *sua sponte* certified for interlocutory review the question of "whether plaintiffs' nuisance claims are removable on the ground that such claims are governed by federal common law" because this issue involves a "controlling question of law as to which there is substantial ground for difference of opinion." *BP*, 2018 WL 1064293, at *5; *see also County of San Mateo v. Chevron Corp.*, No. 17-cv-04929, ECF No. 240. Further, the *San Mateo* Court granted a stay of that case pending resolution of the appeal.

Regardless whether "Judge Alsup erred" in *BP*, Opp. 8, this Court recognized that his "reasoning was well stated and presents an appealing logic." ECF No. 182 at 15. In other words, reasonable jurists could disagree as to whether federal common law governs Plaintiff's

global warming claims. *See United States v. Fourteen Various Firearms*, 897 F. Supp. 271, 273 (E.D. Va. 1995) (finding likelihood of success because another court reached the opposite conclusion and the "case was thoughtfully decided and reasonable minds could differ respecting whether it or the decision now on appeal was the correct reading of the applicable law").

c. Other Grounds for Removal

As Defendants have explained, this case was also properly removed under the Outer Continental Shelf Lands Act ("OCSLA") because Plaintiff's claims arise out of Defendants' fossil-fuel extraction on the Outer Continental Shelf ("OCS"). As the Supreme Court recently held, "[u]nder OCSLA, all law on the OCS is federal law." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S.Ct. 1881, 1886 (2019). Plaintiff contends that *Parker Drilling* is irrelevant because "Defendants were not sued merely for producing fossil fuel products … on the OCS." Opp. 11; *see also id.* 8 (asserting that Plaintiff "challenge[s] Defendants' boardroom decisions to withhold information about the dangers inherent in their products"). Of course, the plaintiff in *Parker Drilling* was also challenging the defendant's "boardroom decision" to withhold overtime pay for work done on the OCS. *Parker Drilling* does not suggest that a plaintiff can avoid OCSLA jurisdiction merely by pointing to *some* tortious activity that did not take place on the OCS. Here, Plaintiff cannot argue that Defendants should be held responsible for alleged harms stemming from fossil fuel production—much of which occurs on the OCS—and then turn around and argue that OCSLA jurisdiction is defeated simply because Defendants' allegedly tortious activity also occurred elsewhere.

Although this Court rejected OCSLA jurisdiction based on Defendants' perceived failure to show that their operations on the OCS were the "but-for" cause of Plaintiff's alleged injuries, Plaintiff does not dispute that other courts have accepted OCSLA jurisdiction—without conducting a "but-for" analysis—over claims that "threaten[ed] 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). This Court did not address that alternative standard for OCSLA jurisdiction. ECF No. 182 at 32-33. Defendants' appeal thus presents a substantial question as to whether "but-for" causation is even required, as well as whether it is satisfied here given Plaintiff's broad theory of causation.

Addressing the likelihood of success on removal under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 313-14 (2005), Plaintiff again improperly faults Defendants for citing "no authority not already considered by the Court." Opp. 12. Although Plaintiff believes it has successfully "distinguished" Defendants' cases, reasonable jurists could disagree on whether Plaintiff's nuisance claims, which require a determination of the "reasonableness" of Defendants' conduct, would necessitate second-guessing federal regulatory decisions making that exact same determination. *See* ECF No. 183-1 at 31, 34; *Bd. of Comm'rs v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 721, 725–26 (5th Cir. 2017).

Plaintiff contends that Defendants' complete preemption argument "cannot be reconciled with the many cases rejecting complete preemption under the [Clean Air] Act." Opp. 12. But as Defendants have explained, those cases addressed tort claims targeting exclusively *in-state* pollution. Here, Plaintiff does not claim that it has been injured by in-state emissions; rather, Plaintiff's claims are premised on the cumulative effect of "global" emissions, and the Clean Air Act's savings clause does not authorize state courts to apply state law to out-of-state sources. *See* ECF No. 183-1. Plaintiff purports to disclaim any "relief that would regulate or constrain emissions," Opp. 12, but the Complaint asserts that a "15 percent annual reduction" in global carbon dioxide emissions is necessary "to restore the Earth's energy balance," Compl. ¶ 180, and

Plaintiff self-evidently seeks to curb greenhouse gas emissions—the alleged cause of its injuries—by punishing fossil fuel companies.

With respect to Defendants' remaining grounds for removal, Plaintiff merely asserts (again) that "Defendants make no new citation or argument" to challenge the Court's original conclusions. Opp. 13. But that is not the correct standard, and each of these additional bases for jurisdiction raises "a distinct possibility a panel of judges on the Fourth Circuit may reach a different conclusion than this Court has on [these] difficult issues." *Holt*, 2014 WL 202112, at *1.

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

Defendants will suffer irreparable harm without a stay because the increased likelihood of active state court litigation and rulings on a broad array of discovery issues threatens to render their statutory right to appeal "hollow." *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, 2016 WL 3346349, at *3 (E.D. Va. June 16, 2016) (collecting cases). Plaintiff asserts that an appeal is rendered meaningless only in the "context of orders to disclose documents that would be impossible to effectively claw back if released," Opp. 14, but *Northrop Grumman* and the cases it cites are not so narrow. To the contrary, courts have held in broad terms that "if [a] stay is denied, the case is actually remanded, and the state court proceeds to move it forward, then the appellate right would be an empty one." 2016 WL 3346349. at *3 (quoting *Ind. State Dist. Council of Laborers & Hod Carriers Pension Fund v. Renal Care Grp., Inc.*, 2005 WL 2237598, at *1 (M.D. Tenn. Sept. 12, 2005)). It makes little sense to litigate the case in state court before the Fourth Circuit has decided whether the claims even belong there.

Without a stay of remand, Plaintiff and Defendants "face the burden of having to simultaneously litigate the appeal before the Fourth Circuit and the underlying case in state court." *Northrop Grumman*, 2016 WL 3346349, at *4. "District courts have been sensitive to

concerns about forcing parties to litigate in two forums simultaneously when granting stays pending appeal." *Id.* Plaintiff contends that proceedings in state court may "help advance the resolution of the case," Opp. 14 (quoting *Broadway Grill, Inc. v. Visa Inc.*, 2016 WL 6069234, at *2 (N.D. Cal. Oct. 17, 2016)), but that is not true because a threshold issue on appeal is *which law* governs Plaintiff's claims. Dispositive motions in state court addressing state law would be a waste of the parties' resources if the Fourth Circuit reverses and determines that federal law applies to Plaintiff's claims. Plaintiff also appears to assume that it would obtain discovery in this Court before any dispositive motions could be resolved. Opp. 15. But that assumption is unwarranted, because discovery in this Court will not commence until a scheduling order is issued, LR 104.4, which customarily does not occur—and should not occur—until Rule 12 motions are resolved.[5]

Plaintiff also ignores the possibility that the state court could reach a final judgment before the appeal is concluded. Plaintiff apparently plans to litigate the scope of appellate review under § 1447(d), Opp. 4-5, which raises an important jurisdictional issue on which the courts of appeals are sharply divided. Accordingly, regardless of how the Fourth Circuit rules on that issue, given the enormous stakes of this case and the circuit split, the Supreme Court may decide to grant certiorari to resolve the split.[6] Insofar as the case could reach judgment in the state court before the Fourth Circuit issues its decision, a Fourth Circuit decision in favor of Defendants that

[5] *See Wymes v. Lustbader*, No. 10-1629-WDQ, 2012 WL 1819836, at *4 (D. Md. May 16, 2012) (noting that, "[o]n motion, it is not uncommon for courts to stay discovery pending resolution of dispositive motions") (citing *Coastal States Gas Corp. v. Dep't of Energy*, 84 F.R.D. 278, 282 (D.C. Del. 1979)); *see also Stone v. Trump*, 335 F. Supp. 3d 749, 754 (D. Md. 2018) ("When a dispositive motion has the potential to dispose of the case, it is within the Court's discretion to stay discovery pending resolution of that motion.").

[6] The scope of review under § 1447(d) is also at issue in the *San Mateo* appeals (and may be raised in the First Circuit given the remand order in *State of Rhode Island v. Chevron Corp*, No. 18-395, ECF No. 122 (D. R.I.)), making it even more likely that the Supreme Court will review the issue.

the case belongs in federal court would be rendered "meaningless." *Northrop Grumman*, 2016 WL 33436349, at *4. Because "[m]eaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable," the Court should stay the remand order pending appeal. *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979).

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

Finally, the balance of harms weighs strongly in Defendants' favor because a stay would not prejudice Plaintiff's ability to seek damages or other relief, or meaningfully exacerbate its alleged injuries. Indeed, a stay would preserve the parties' and the state court's resources—by avoiding costly state court litigation that could be rendered irrelevant if the Fourth Circuit reverses. Plaintiff argues that the appeal itself could be a "fruitless exercise," Opp. 17, but as explained above, the appeal raises substantial questions.

Plaintiff contends that the balance of harms cuts in its favor because of its purported interest in avoiding "continued interference with state court proceedings." Opp. 17. But unlike the cases Plaintiff cites, there currently *are no state court proceedings* with which a stay would interfere. In *SFA Grp., LLC v. Certain Underwriters at Lloyd's London*, 2017 WL 7661481, at *2 (C.D. Cal. Jan. 6, 2017), the defendants waited until three months *after* the case had been remanded to ask for an *ex parte* stay. The court declined to issue a stay because "[g]ranting relief … would interfere in state court proceedings after remand ha[d] already taken effect." *Id.* at *2; *see also Maui Land & Pineapple Co. v. Occidental Chem. Corp.*, 24 F. Supp. 2d 1083 (D. Haw. 1998) (declining to recall remand where the "action ha[d] already been certified to the state court"); *Browning v. Navarro*, 743 F.2d 1069, 1078-79 (5th Cir. 1984) ("once a district court has decided to remand a case and has so notified the state court, the district judge is without power to

take any further action."). Here, this Court still has jurisdiction over the case and a stay will not interfere with any ongoing state court proceedings.

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. If the Court decides that a stay pending appeal is not warranted, it should extend the temporary stay, pursuant to the Court's stipulated order (*see* ECF No. 185), to allow Defendants to seek a stay from the Fourth Circuit.

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Respectfully submitted,

CHEVRON CORP. AND CHEVRON U.S.A., INC.

By: */s/ Ty Kelly*
Ty Kelly (Bar No. 27166)
Jonathan Biran (Bar No. 28098)
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C.
100 Light Street, 19th Floor
Baltimore, MD 21202
Telephone: (410) 685-1120
E-mail: tykelly@bakerdonelson.com
E-mail: jbiran@bakerdonelson.com

Theodore J. Boutrous, Jr. (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7000
E-mail: tboutrous@gibsondunn.com

Anne Champion (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-4000
E-mail: achampion@gibsondunn.com

Joshua S. Lipshutz (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 530-9614
E-mail: jlipshutz@gibsondunn.com

Neal S. Manne (*pro hac vice*)
SUSMAN GODFREY LLP
1000 Louisiana, Suite 5100
Houston, TX 77002
Telephone: (713) 651-9366
E-mail: nmanne@susmangodfrey.com

Attorneys for Defendants CHEVRON CORP. and CHEVRON U.S.A., INC.

By: */s/ John B. Isbister*

John B. Isbister (Bar No. 00639)
Jaime W. Luse (Bar No. 27394)
TYDINGS & ROSENBERG LLP
One East Pratt Street, Suite 901
Baltimore, MD 21202
Telephone: 410-752-9700
Facsimile: 410-727-5460
Email: jisbister@tydingslaw.com
Email: jluse@tydingslaw.com

Philip H. Curtis (*pro hac vice*)
Nancy G. Milburn (*pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8383
Facsimile: (212) 715-1399
E-mail: philip.curtis@arnoldporter.com
E-mail: nancy.milburn@arnoldporter.com

Matthew T. Heartney (admitted *pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844
Telephone: (213) 243-4000
Facsimile: (213) 243-4199
E-mail: matthew.heartney@arnoldporter.com

Attorneys for Defendants BP PRODUCTS NORTH AMERICA INC., BP plc, and BP AMERICA INC.

By: */s/ Craig A. Thompson*

Craig A. Thompson, (Bar No. 26201)
VENABLE LLP
750 East Pratt Street, Suite 900
Baltimore, MD 21202
Telephone: (410) 244-7605
Facsimile: (410) 244-7742
Email: cathompson@venable.com

Theodore V. Wells, Jr. (*pro hac vice*)
Daniel J. Toal (*pro hac vice*)
Jaren Janghorbani (*pro hac vice*)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3089
Fax: (212) 492-0089
E-mail: twells@paulweiss.com
E-mail: dtoal@paulweiss.com
E-mail: jjanghorbani@paulweiss.com

Kannon K. Shanmugam (*pro hac vice pending*)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street NW
Washington, DC 20006-1047
Telephone: (202) 223-7325
E-Mail: kshanmugam@paulweiss.com

Attorneys for Defendants EXXON MOBIL CORPORATION and EXXONMOBIL OIL CORPORATION.

By: */s/ James M Webster, III*

David C. Frederick (*pro hac vice*)
James M. Webster, III (Bar No. 23376)
Brendan J. Crimmins (*pro hac vice*)
Grace W. Knofczynski (*pro hac vice*)
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
E-mail: dfrederick@kellogghansen.com
E-mail: jwebster@kellogghansen.com
E-mail: bcrimmins@kellogghansen.com
E-mail: dsuska@kellogghansen.com

Jerome C. Roth (*pro hac vice*)
Elizabeth A. Kim (*pro hac vice*)
MUNGER, TOLLES & OLSON LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077
E-mail: jerome.roth@mto.com
E-mail: elizabeth.kim@mto.com

Attorneys for Defendants SHELL OIL COMPANY and ROYAL DUTCH SHELL, plc

By: */s/ Warren N. Weaver*

Warren N Weaver (Bar No. 3600)
Peter Sheehan (Bar No. 29310)
WHITEFORD TAYLOR AND
PRESTON LLP
Seven Saint Paul St Ste 1400
Baltimore, MD 21202
Telephone: (410) 347-8757
Facsimile: (410) 223-4177
Email: wweaver@wtplaw.com

Nathan P. Eimer, Esq. (*pro hac vice*)
Pamela R. Hanebutt, Esq. (*pro hac vice*)
Lisa S. Meyer, Esq. (*pro hac vice*)
Raphael Janove, Esq. (*pro hac vice*)
EIMER STAHL LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
Telephone: (312) 660-7600
Facsimile: (312) 692-1718
E-mail: neimer@EimerStahl.com
E-mail: phanebutt@EimerStahl.com E-mail: lmeyer@EimerStahl.com E-mail: rjanove@Eimerstahl.com

Attorneys for Defendant CITGO PETROLEUM CORPORATION

By: */s/ Jonathan C. Su*

Jonathan Chunwei Su (Bar No. 16965)
LATHAM AND WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
Email: jonathan.su@lw.com

Steven M. Bauer (*pro hac vice*)
Margaret A. Tough (*pro hac vice*)
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
PHONE: (415) 391-0600
FAX: (415) 395-8095
E-mail: steven.bauer@lw.com
E-mail: margaret.tough@lw.com

Sean C. Grimsley, Esq. (*pro hac vice*)
Jameson R. Jones, Esq. (*pro hac vice*)
BARTLIT BECK HERMAN
PALENCHAR & SCOTT LLP
1801 Wewatta Street, Suite 1200
Denver, CO 80202
PHONE: (303) 592-3100
FAX: (303) 592-3140
E-mail: sean.grimsley@bartlit-beck.com
E-mail: jameson.jones@bartlit-beck.com

Attorneys for Defendants PHILLIPS 66, CONOCOPHILLIPS and CONOCOPHILLIPS COMPANY

By: */s/ Michael A. Brown*

Michael A. Brown
NELSON MULLINS RILEY & SCARBOROUGH LLP
100 S. Charles Street, Suite 1200
Baltimore, MD 21201
Telephone: (443) 392-4901
Email: mike.brown@nelsonmullins.com

Sean C. Grimsley (*pro hac vice*)
Jameson R. Jones (*pro hac vice*)
BARTLIT BECK HERMAN
PALENCHAR & SCOTT LLP
1801 Wewatta Street, Suite 1200
Denver, CO 80202
Telephone: (303) 592-3100
Email: sean.grimsley@bartlit-beck.com
Email: jameson.jones@bartlit-beck.com

Attorneys for Defendants CONOCOPHILLIPS and CONOCOPHILLIPS CO.

By: */s/ Shannon S. Broome*

Shannon S. Broome (*pro hac vice*)
HUNTON ANDREWS KURTH LLP
50 California Street
San Francisco, CA 94111
Tel: (415) 975-3718
Fax: (415) 975-3701
E-mail: SBroome@HuntonAK.com

Shawn Patrick Regan (*pro hac vice*)
HUNTON ANDREWS KURTH LLP
200 Park Avenue
New York, NY 10166
Tel: (212) 309-1046
Fax: (212) 309-1100
E-mail: SRegan@HuntonAK.com

Ann Marie Mortimer (*pro hac vice*)
HUNTON ANDREWS KURTH LLP
550 South Hope Street, Suite 2000
Los Angeles, CA 90071
Tel: (213) 532-2103
Fax: (213) 312-4752
E-mail: AMortimer@HuntonAK.com

Perie Reiko Koyama (Bar No. 20017)
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037
Telephone: (202) 778-2274
Facsimile: (202) 778-2201
Email: PKoyama@HuntonAK.com

Attorneys for Defendants MARATHON PETROLEUM CORP. and SPEEDWAY, LLC

By: */s/ Emily Wilson*

Emily Wilson (Bar No. 20780)
Megan Berge (*pro hac vice*)
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave, NW
Washington, D.C. 20004
Telephone: (202) 639-7700
Facsimile: (202) 639-1171
Email: emily.wilson@bakerbotts.com
Email: megan.berge@bakerbotts.com

Scott Janoe (*pro hac vice*)
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
Telephone: (713) 229-1553
Facsimile: (713) 229 7953
Email: scott.janoe@bakerbotts.com

Attorneys for Defendant HESS CORP.

By: */s/ Thomas K. Prevas*

Michelle N. Lipkowitz (Bar No. 27188)
Thomas K. Prevas (Bar No. 29452)
SAUL EWING ARNSTEIN & LEHR LLP
Baltimore, Maryland 21202-3133
Telephone: (410) 332-8683
Facsimile (410) 332-8123
Email: michelle.lipkowitz@saul.com
Email: Thomas.prevas@saul.com

Attorneys for Defendants CROWN CENTRAL LLC, and CROWN CENTRAL NEW HOLDINGS LLC.

By: */s/ Tracy Ann Roman*

Kathleen Taylor Sooy (*pro hac vice*)
Tracy Ann Roman (Bar No. 11245)
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: 202-624-2500
Facsimile: 202-628-5116
Email: ksooy@crowell.com
Email: tromanna crowell.com

Attorneys for Defendants CNX RESOURCES CORPORATION, CONSOL ENERGY INC. and CONSOL MARINE TERMINALS LLC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July 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
Ty Kelly