No. 19-1644

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,
Plaintiff – Appellee,
v.
BP P.L.C., et al.,
Defendants – Appellants.

Appeal from the United States District Court
for the District of Maryland, No. 1:18-cv-02357-ELH
The Honorable Ellen L. Hollander

PLAINTIFF – APPELLEE'S OPPOSITION TO STAY PENDING APPEAL

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INTRODUCTION

Defendants–Appellants' ("Defendants") Motion to Stay Pending Appeal ("Motion") makes three main arguments—all of which the district court already rebuffed as already "rejected," "unavailing," or "disingenuous." *See* Motion Ex. E, Memorandum Opinion Denying Stay, at 8, 9 & n.2.This Court likewise should deny the instant motion.

First, Defendants incorrectly assume that all of their rejected grounds for removal are reviewable on appeal. However, "only the issue of federal officer removal would be subject to review" under binding Fourth Circuit case law and in the majority of sister circuits. *Id.* at 8. Defendants are not likely to succeed on the merits of this issue because, *inter alia*, they failed to assert plausible facts required to invoke federal officer jurisdiction. And even if Defendants' other purported bases for federal jurisdiction were properly before the Court, Defendants have no likelihood of securing reversal.

Second, Defendants' assertion of irreparabe harmed if litigation proceeds in state court pending appeal is, as the district court concluded, "unavailing," "speculative," and "disingenuous." *Id.* at 9.

Third, Defendants argue that the balance of harm tilts in their favor. Not so: it tips sharply in the City's favor. As affirmed by the district court, a stay "would further delay litigation on the merits of the City's claims", which favors "denial of a

stay, particularly given the seriousness of the City's allegations and the amount of damages at stake." *Id.* at 11. This Court should likewise deny a stay.

STATEMENT OF FACTS

Plaintiff–Appellee the Mayor and City Council of Baltimore (the "City") filed its complaint in Maryland state court against 26 oil and gas companies on July 20, 2018. The City alleges that Defendants have substantially harmed it through, among other activities, producing, marketing, and selling fossil fuel products all while actively deceiving customers and the public about their products' climatic hazards. Motion Ex. A, Complaint, ¶¶ 1–8. The complaint asserts Maryland common law causes of action for public and private nuisance, strict liability and negligent failure to warn, strict liability and negligent design defect, trespass, and violation of the Maryland Consumer Protection Act. *Id.* ¶¶ 218–98.

On July 31, 2018, Defendants Chevron Corp. and Chevron U.S.A., Inc. removed this action to the Federal District Court for the District of Maryland, raising eight separate purported grounds for removal. Motion Ex. B, Notice of Removal. One of Defendants' eight asserted grounds was federal officer removal under 28 U.S.C. § 1442. *Id.* at 7, ¶ 9.

The City moved to remand on September 11, 2018. On June 10, 2019, Judge Hollander granted the motion. Motion Ex. C, Remand Order. Defendants filed a notice of appeal on June 12, 2019. Motion Ex. D. On June 23, 2019, Defendants

filed a motion to stay pending appeal in the district court. On July 31, 2019, the district court denied Defendants' motion to stay, finding that only their federal officer argument was reviewable on appeal, and staying execution of the Remand Order was not warranted. Motion Ex. E at 8–9. The court also found that Defendants did not satisfy their burden to obtain a stay even if the entire Remand Order were reviewable on appeal. *Id.* at 9–11.

LEGAL STANDARD

A stay pending appeal is an "intrusion into the ordinary processes of administration and judicial review," and as such "is not a matter of right," but "is instead 'an exercise of judicial discretion,'" with the "party requesting a stay bear[ing] the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 556 U.S. 418, 423, 427, 433–34 (2009) (citations omitted). Defendants bear a "heavy burden" in seeking this "extraordinary relief." *Winston–Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971).

In the Fourth Circuit, "[t]he standard for considering a request for a stay pending appeal is the same standard that governs a request for a preliminary injunction." *Davis v. Taylor*, No. CA 2:12-3208-RMG-BM, 2012 WL 6055452, at *3 (D.S.C. Nov. 16, 2012), *report and recommendation adopted*, No. CA 2:12-3208-RMG, 2012 WL 6085245 (D.S.C. Dec. 6, 2012). "Under this standard, the movant must establish each of the following four requirements: '[1] that he is likely to

succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" *Rose v. Logan*, No. BR 12-25471-RAG, 2014 WL 3616380, at *2 (D. Md. July 21, 2014) (quoting *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009), *judgment vacated on other grounds*, 559 U.S. 1089 (2010)).[1] The first two factors are the "most critical." *Nken*, 556 U.S. at 434.

ARGUMENT

A. Defendants Are Not Likely to Succeed on the Merits of Their Appeal

To obtain a stay, Defendants must first demonstrate "there is a *strong likelihood* that the issues presented on appeal could be rationally resolved in favor of the party seeking the stay." *United States v. Fourteen Various Firearms*, 897 F. Supp. 271, 273 (E.D. Va. 1995) (emphasis added). "It is not enough that the chance of success on the merits be better than negligible," and "more than a mere possibility

[1] Courts in this Circuit formerly applied the more lenient test in *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970), for motions to stay pending appeal. In *Real Truth About Obama*, however, the Fourth Circuit held that the four-part test first articulated in *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7 (2008), governs motions for preliminary injunctions, and thus in turn applies to motions to stay. 575 F.3d at 345–47; *In re Schweiger*, 578 B.R. 734, 737 (Bankr. D. Md. 2017) ("[T]he *Winter* standard applies to the determination of whether to grant a stay pending appeal.") (collecting cases).

of relief is required." *Nken*, 556 U.S. at 434 (citations and punctuation omitted). Defendants cannot meet this burden.

1. Only Defendants' Attempt to Invoke Federal Officer Jurisdiction Is Reviewable.

Defendants had no legitimate basis for asserting federal officer jurisdiction, which is the only argument subject to appellate review among what the district court termed their "proverbial 'laundry list' of grounds for removal." *See* Motion Ex. C at 4. The removal statute tightly limits review of orders granting remand:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 [federal officer removal] or 1443 [civil rights cases] of this title shall be reviewable by appeal or otherwise.

See 28 U.S.C. § 1447(d). Although § 1447(d) allows Defendants to appeal the district court's rejection of federal officer removal, raising a meritless federal officer argument does not beget appellate rights as to *other* explicitly non-reviewable grounds. To the contrary, this Court has rejected that argument with respect to the virtually identical civil rights removal statute, 28 U.S.C. § 1443: "Jurisdiction to review remand of a § 1441(a) removal is not supplied by also seeking removal under § 1443(1)." *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976). The majority of other circuits have likewise found that appeal under §§ 1442 or 1443 does not render other removal bases reviewable. *See, e.g.*, *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006) (limiting review to basis for removal for which § 1447(d) authorized

appeal); *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1229 (8th Cir. 2012) (§ 1447(d) precluded the court from considering whether removal was proper under federal common law, and reviewing only removal under the federal officer statute and Class Action Fairness Act).

Defendants' assertion that the entire Remand Order is reviewable on appeal merely because they included a federal officer argument is not supported by their citations. In *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, 865 F.3d 181 (4th Cir. 2017), the Fourth Circuit had jurisdiction over the appeal of a remand order because federal officer jurisdiction was the *only* asserted basis for removal. 865 F.3d at 185–86 ("We review de novo the district court's decision granting a motion to remand for lack of jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442."). That is not the case here, where Defendants attempted to remove on seven theories in addition to federal officer jurisdiction.

Defendants' contention that *Noel* does not survive the Removal Clarification Act of 2011, Pub. L. 112-51, 125 Stat. 545 & 546, is unsupported. The Act amended § 1447(d) by inserting the words "1442 or" before "1443," with no other changes. The holding in *Noel* that the court of appeals only has jurisdiction to review those bases for removal expressly included in § 1447(d) is in no way altered by that amendment, and the Fourth Circuit has since affirmed *Noel*'s holding limiting the scope of review. *See* Stay Denial at 7 (citing *Lee v. Murraybey*, 487 F. App'x 84, 85

(4th Cir. 2012)). There is no basis in logic or statutory interpretation to believe that Congress intended § 1447(d) to treat removal under § 1442 differently from removal under § 1443, and Defendants present none.

Defendants' argument that a circuit split on the issue itself provides a basis for a stay is also rebutted by the sole authority they cite for the proposition. In *In re Cintas Corp. Overtime Pay Arbitration Litig.*, No. M06-CV-01781-SBA, 2007 WL 1302496, at *2 (N.D. Cal. May 2, 2007), the district court certified a jurisdictional issue for interlocutory appeal in part because "[t]he Ninth Circuit ha[d] not yet squarely ruled on this question" and other circuit authority was split. Here, the Fourth Circuit *has* ruled, and it has ruled against Defendants' position.

This makes Defendants' out-of-circuit citations hollow, even if they were relevant to the circumstances here. Defendants point to two cases that expanded the scope of review beyond the issue of federal officer jurisdiction. *See* Motion at 9–10; *citing Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015); *Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017), *cert. denied sub nom. Cook v. Mays*, 138 S. Ct. 1557, 200 L. Ed. 2d 743 (2018). But *Lu Junhong* allowed such review based explicitly—and exclusively—on an erroneous reading of *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996). *See Lu Junhong*, 792 F.3d at 811–12.[2]

[2] The appellees in *Mays* did not contest the court's jurisdiction, and instead conceded that because the removing defendants "attempted to remove this case pursuant to

Yamaha did not involve a remand order, but an order certifying interlocutory appeal under 28 U.S.C. § 1292(b). That provision permits discretionary review of interlocutory orders certified by the district court as presenting a "controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Based on § 1292(b)'s plain text, the Supreme Court determined courts of appeals may exercise jurisdiction over any question "fairly included within the *certified* order," and jurisdiction was "not tied to the particular [controlling question of law] formulated by the district court." *Yamaha*, 516 U.S. at 205 (emphasis added). *Yamaha*'s reasoning is sensible in the context of § 1292(b), under which the district court may certify virtually any non-final order for appeal at any point in the litigation, and where limiting review to the particular "controlling question of law" as formulated by the district court could create opportunities for repeated appeals that unreasonably lengthen the litigation. Under § 1447(d), by contrast, Congress enumerated only two bases for removal that may be reviewed on appeal, against the statutory backdrop that "§ 1447(d) bars [appellate] review 'even if the remand order is manifestly, inarguably erroneous.'" *In re Norfolk S. Ry. Co.*,

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28 U.S.C. § 1442, the federal officer removal provision, the order remanding the case is reviewable on appeal." Plaintiffs-Appellees' Corrected Brief on Appeal at *1, *Mays v. City of Flint*, No. 16-2484, 2017 WL 541950 (6th Cir. Feb. 1, 2017). The Sixth Circuit's complete discussion of the issue thus consisted of once sentence, citing *Lu Junhong* and no other decisional authority. *Mays*, 871 F.3d at 442 ("Our jurisdiction to review the remand order also encompasses review of the district court's decision on the alternative ground for removal under 28 U.S.C. § 1441.").

756 F.3d 282, 287 (4th Cir. 2014) (quoting *Lisenby v. Lear*, 674 F.3d 259, 261 (4th Cir. 2012)). *Yamaha*'s permissive reading of § 1292(b) comports with the statutory text and limits "prolonged litigation on threshold nonmeritorious questions"—precisely the purpose served by a restrictive application of § 1447(d). *See In re Norfolk S. Ry. Co.*, 756 F.3d at 287.

Moreover, the *Yamaha* Court manifestly did not purport to establish a general rule regarding the scope of appeal for every statute using the word "order." The Court has often "affirmed that identical language may convey varying content when used in different statutes," and must be construed in light of the context of each use. *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality) ("In law as in life . . . the same words, placed in different contexts, sometimes mean different things."). Here, the text, structure, and purposes of § 1447(d) differ significantly from § 1292(b), the provision at issue in *Yamaha*. Section 1447(d) makes certain remand orders merely "review*able*," removing a barrier to an appeal that must be authorized and delimited by other provisions of law. Section 1292(b), in contrast, directly authorizes appeals of a certified order.

In addition, even if § 1292(b)—in contrast to § 1447(d)—opens a wide range of issues to appeal, it does so only in narrow procedural postures. A § 1292(b) appeal is permitted only when both the district court and the court of appeals concur that a controlling question of law exists as to which reasonable minds could differ.

Defendants' interpretation of § 1447(d), however, would allow an appeal *as of right* whenever a removing defendant has asserted federal officer jurisdiction, with no gatekeeping performed by any court. Finally, § 1292(b) does not contain anything similar to § 1447(d)'s express bar on appellate review of remands based on lack of federal subject matter jurisdiction and procedural defects. While interlocutory appeals under § 1292(b) allow review of questions of law *earlier* than normally permitted—before a final judgment has issued—Defendants' interpretation would permit review of issues under § 1447(d) that are ordinarily expressly prohibited from appellate review *at all*.

Even if this Court could consider the merits of Defendants' other jurisdictional arguments, their stay request remains unfounded because this Court would likely reach the same conclusion as the district court: the City has asserted exclusively Maryland law claims, which should be decided under Maryland law principles, in Maryland state court. The Remand Order here meticulously analyzed and rejected the entirety of Defendants' notice of removal, and there is a substantial likelihood that this Court will adopt the district court's analysis—whether it rules on the federal-officer question only or on all of Defendants' arguments.

2. Removal Based on Federal Officer Jurisdiction Is Meritless

Defendants contend that their appeal "presents substantial legal questions" with respect to removal under 28 U.S.C. § 1442. As the district court found,

however, Defendants "have not demonstrated a substantial likelihood of success on the merits of this issue, or even that removal of this case under the federal officer removal statute raises a complex, serious legal question." Motion Ex. E at 8.

As district court emphasized in its Remand Order and again in denying the motion for stay, Defendants have "failed to plausibly assert that the acts for which they have been sued were carried out 'for or relating to'" any federal directive. Motion Ex. C at 37. Defendants offer no reason to think this Court would view their argument any more favorably. They instead rehash the same arguments and facts considered and rejected by the district court, as well as by two other federal district courts considering removal in cases alleging harms from climate change. *See* Motion Ex. E at 8–9; *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018) (rejecting the "dubious assertion of federal officer removal" because defendants had "not shown a 'causal nexus' between the work performed under federal direction and the plaintiffs' claims, which are based on a wider range of conduct"); *Rhode Island v. Chevron Corp.*, ___ F. Supp. 3d ___, No. 18-395-WES, 2019 WL 3282007, at *5 (D.R.I. July 22, 2019) (federal officer removal fails because "[d]efendants cannot show the alleged promotion and sale of fossil fuels abetted by a sophisticated misinformation campaign were 'justified by [their] federal duty'" (quoting *Mesa v. California*, 489 U.S. 121, 131–32 (1989)). Merely parroting arguments rejected by the court below and other district courts cannot show a

likelihood of success on the merits. *See, e.g.*, *Gens v. Kaelin*, No. 17-cv-03601-BLF, 2017 WL 3033679 (N.D. Cal. July 18, 2017) ("Repetition of arguments previously made and rejected is insufficient to satisfy the first *Nken* factor.").

The district court concluded that even assuming the other elements of federal officer removal were satisfied (which they are not), Defendants had not shown any federal direction of the conduct for which they were sued, namely "their contribution to climate change by producing, promoting, selling, and concealing the dangers of fossil fuel products." *Id.* at 36. As the district court rightly held: "Defendants have not shown that a federal officer controlled their total production and sales of fossil fuels, nor is there any indication that the federal government directed them to conceal the hazards of fossil fuels or prohibited them from providing warnings to consumers." *Id.*; *accord Rhode Island*, 2019 WL 3282007, at *5; *County of San Mateo*, 294 F. Supp. 3d at 939.

The out-of-circuit cases Defendants cite, *Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705, 709 (E.D. Tex. 1998), and *Lalonde v. Delta Field Erection*, No. CIV.A.96-3244-B-M3, 1998 WL 34301466 (M.D. La. Aug. 6, 1998), do nothing to undermine the district court's finding that the requisite causal nexus is absent. In both cases, the defendants established a causal nexus between a period of federal control over the defendants' conduct and the plaintiffs' claims. Here, however, Defendants failed to establish a sufficient connection during *any* period.

Defendants offer no reason why this Court should evaluate the merits of their federal-officer argument any differently than the district court, let alone that they can meet the "strong likelihood" requirement for a stay. Because this is the only basis on which Defendants' may seek review, a stay pending appeal is inappropriate.

3. There Is No Basis for Removal Under Any Other Grounds

a. Federal Common Law

Defendants' bald assertion that a "substantial legal question" exists concerning whether the City's claims "arise under federal common law" cites the same decisional authority that was before the district court throughout the parties' briefing. Defendants rely principally on Judge Alsup's order in *California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("Alsup Order"), to support their contention that the City's Maryland law claims are "governed by" and thus "necessarily arise under federal common law." Motion at 12–13. The district court carefully considered and rejected Judge Alsup's heavily criticized order and ruled to the contrary. Motion Ex. C at 14–16, citing, *inter alia*, Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from California v. BP*, 117 Mich. L. Rev. Online 25, 32–35 (2018). Quite simply, Judge Alsup erred by accepting a preemption defense not properly before the court as a basis for jurisdiction, and failed to apply the proper test for determining whether federal question jurisdiction lies over well-pleaded state law claims. *See*

Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005). The only other courts that have squarely addressed the issue—Judge Chhabria in *County of San Mateo* and Chief Judge Smith in *Rhode Island*—reached the same conclusion as Judge Hollander here. *See County of San Mateo*, 294 F. Supp. 3d at 937 ("federal common law does not govern the plaintiffs' claims"); *Rhode Island*, 2019 WL 3282007, at *2 ("there is nothing in the artful-pleading doctrine that sanctions this particular transformation" from a state law claim into one "necessarily governed by federal common law")

Except in the circumstance described in *Grable*, there can be no federal question jurisdiction over a complaint that on its face alleges exclusively state law claims, even if those claims are arguably preempted by federal law. *See, e.g.*, *Pinney v. Nokia, Inc.*, 402 F.3d 430, 449 (4th Cir. 2005) ("The Supreme Court has been quite clear that for removal to be proper under the substantial federal question doctrine, a plaintiff's ability to establish the necessary elements of his state law claims must rise or fall on the resolution of a question of federal law."); *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 817 (4th Cir. 2004) ("In other words, if the plaintiff can support his claim with *even one* theory that does not call for an interpretation of federal law, his claim does not 'arise under' federal law for purposes of § 1331." (emphasis added)).

The City's eight causes of action are, as the district court correctly found, "all founded on Maryland law." Motion Ex. C at 1. Defendants do not engage the district court's holding that their "arising under federal common law" argument is a "cleverly veiled preemption argument." *Id.* at 12. Indeed, they do not even mention preemption (ordinary or complete) *at all* in discussing federal common law, despite its correctly being the focus of the district court's analysis. *See* Motion at 12–13. Defendants do not seriously defend their position or challenge the district court's reasoning, and as such they cannot show the required "strong likelihood that the issues presented on appeal could be rationally resolved" in their favor. *Fourteen Various Firearms*, 897 F. Supp. at 273.

b. *Grable*

As the district court correctly ruled, Defendants' voluminous submissions "have failed to establish . . . that a federal *issue* is a 'necessary element' of Plaintiff's state law claims." Motion Ex. C at 23; *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 9–10 (1983) (federal question jurisdiction exists only where a "question of federal law is a necessary element of one of the well-pleaded state claims"); *Gunn v. Minton*, 568 U.S. 251, 259 (2013) (stating four-part test to determine whether well-pleaded state law claims arise under federal law). Defendants' recitation of their *Grable* arguments cites authority already considered and properly rejected by the district court, and inapposite authority

already distinguished in the City's briefing below. *See* Motion at 16–17; Motion Ex. C at 18–23.

The City's well-pleaded state law claims do not fall within the "slim category" of cases for which removal is permitted under Supreme Court and Fourth Circuit authority. *See Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006). Defendants cannot establish any likelihood of appellate success on this ground either.

c. Outer Continental Shelf Lands Act

Defendants' contention that they have a "substantial argument" under the Outer Continental Shelf Lands Act ("OCSLA") relies on a wholly inapposite Supreme Court opinion that involved no jurisdictional question. In *Parker Drilling Management Services, Ltd. v. Newton*, the plaintiff worked on drilling platforms off the California coast, and filed a class action alleging violations of California wage-and-hour laws and related claims based on work that he and others physically performed on those platforms. ___ U.S.___, 139 S. Ct. 1881, 1886 (June 10, 2019). The defendant removed to federal court and moved for judgment on the pleadings. *Id.* There is no indication that the plaintiff contested removal, and the parties agreed that plaintiff's work on defendant's platforms was governed by OCSLA. *Id.* Under OCSLA, exclusive federal jurisdiction exists over the Outer Continental Shelf ("OCS"), and the laws of adjacent states are incorporated as the governing federal

law "[t]o the extent that they are applicable and not inconsistent with" any other federal provision. 43 U.S.C. § 1333(a)(2)(A). The issue before the Court in *Parker* was whether California wage-and-hour law applied on adjacent regions of the OCS, in addition to the federal Fair Labor Standards Act—a choice of law question with no relevance or relationship to removal jurisdiction. *Parker Drilling* has no bearing on whether the City's state law claims here were removable, where, as the district court explained in its Remand Order, "Defendants were not sued merely for producing fossil fuel products, let alone for merely producing them on the OCS," and "[D]efendants offer no basis to enable this Court to conclude that claims for injuries stemming from climate change would not have occurred but for defendants' extraction activities on the OCS." Motion Ex. C at 33. Nothing in *Parker* overcomes the district court's rejection of OCSLA removal jurisdiction.

d. Remaining Removal Grounds

Defendants' tepid, one-sentence conclusion that their "other removal grounds . . . also raise substantial questions" obviously does not demonstrate a likelihood of success on the merits. *See* Motion at 18. The fact that Defendants decline to even name those other grounds further belies their substantiality.

B. Defendants Will Not Suffer Irreparable Harm Absent a Stay.

No stay may issue without a finding that the threatened harm to the moving party is truly "irreparable," and that such irreparable harm is at least probable. *See*

Nken, 556 U.S. at 430 (the "possibility standard is too lenient"); *id.* at 434–35. "[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to show irreparable harm. *Long v. Robinson*, 432 F.2d 977, 980 (4th Cir. 1970). In particular, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *see also Venus Springs v. Ally Fin., Inc.*, No. 3:10-CV-00311-MOC, 2015 WL 1893825, at *4 (W.D.N.C. Apr. 27, 2015) ("Though Plaintiff will indeed face financial consequences for not complying with the court order, the court finds that such consequences do not constitute irreparable harm.").

Where a case is in its early stages, "the risk of harm to [defendant] if discovery proceeds is low." *DKS, Inc. v. Corp. Bus. Sols., Inc.*, No. 2:15-cv-00132-MCE-DAD, 2015 WL 6951281, at *2 (E.D. Cal. Nov. 10, 2015) (denying motion to stay pending appeal); *see also Nero v. Mosby*, No. CV 16-1304, 2017 WL 1048259, at *2 (D. Md. Mar. 20, 2017) (denying motion to stay pending appeal from order denying in part defendant's motion to dismiss, because defendant would "not suffer irreparable injury" from participating in discovery on remaining claims "and a stay would only delay any discovery-related burden"). Thus, even "if the case proceeds in state court but then ultimately returns to federal court, the interim proceedings in state court may well help advance the resolution of the case." *Broadway Grill, Inc.*

v. Visa Inc., No. 16-CV-04040-PJH, 2016 WL 6069234, at *2 (N.D. Cal. Oct. 17, 2016).

Defendants' appeal here would not become "meaningless" without a stay, as Defendants contend. *See* Motion at 19. Nothing that occurs in state court upon remand could moot or even affect Defendants' appeal. The cases on which Defendants primarily rely arose in the very different context of orders to disclose documents that would be impossible to claw back if released, thereby mooting any meaningful appeal from the trial courts' disclosure orders. *See Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) (once surrendered, "confidentiality will be lost for all time").[3] In the unlikely event this Court reverses the district court's remand order, the state court proceedings would be suspended, the cases would return to the district court, and discovery and other pre-trial proceedings would presumably pick up exactly where they left off in state court.

Defendants insist that having to litigate their federal appeal and the remanded state court actions at the same time would "force Defendants—and Plaintiff—to

[3] While the court in *CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC* held that loss of appellate rights can constitute irreparable harm, it recognized its decision was "at odds with a number of bankruptcy decisions in this circuit," and ultimately ruled that "even assuming the loss of appellate rights does not constitute per se irreparable harm, . . . the [moving parties] made a sufficient showing of irreparable harm in this case." No. 5:13-CV-278-F, 2013 WL 3288092, at *7 (E.D.N.C. June 28, 2013).

spend substantial time and money litigating." Motion at 19. But Defendants' appeal is not from a potentially dispositive motion that could end all litigation against them. Regardless of the outcome of any appeal, Defendants will still be required to respond to the same discovery. The district court even agreed that proceeding in state court while the appeal is pending "may well advance the resolution of the case." Motion Ex. E at 11. No incremental burden—much less irreparable injury—results from discovery incepting in a Maryland state court rather than a federal court.

C. The Balance of Harms Drastically Favors the City, and a Stay Is Not in the Public Interest.

A stay would prevent the City from seeking prompt redress of its claims. Proceedings have already been delayed by more than a year since the City filed its Complaint. *See generally* Motion Ex. A. On that basis alone, the public interest and balance of equities weigh against Defendants' continued interference with the City's exercise of its right to proceed in Maryland state court. *See Maui Land & Pineapple Co. v. Occidental Chem. Corp.*, 24 F. Supp. 2d 1083, 1087 (D. Haw. 1998) (refusing to stay remand order pending appeal because, in part, "the public interest at stake in this case is the interference with state court proceedings"); *see also Browning v. Navarro*, 743 F.2d 1069, 1079 n.26 (5th Cir. 1984) (declining to stay remand pending appeal "out of respect for the state court and in recognition of principles of comity").

Although Defendants argue that a stay would avoid costly and potentially duplicative litigation, the truth is their current appeal "may be a fruitless exercise, costing the parties time and money that could otherwise be spent litigating the merits." *See SFA Grp., LLC v. Certain Underwriters at Lloyd's London*, No. CV 16-4202-GHK(JCX), 2017 WL 7661481, at *2 (C.D. Cal. Jan. 6, 2017). The City's case has now been sent back to where it belongs—state court—and the public interest requires that it proceed there.

CONCLUSION

For the reasons explained above, this Court should deny Defendants' Motion to Stay Pending Appeal.

Dated: August 16, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5,124 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

Dated: August 16, 2019 /s/ Victor M. Sher

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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