**UNITED STATES DISTRICT COURT**
**DISTRICT OF MARYLAND**
(Northern Division)

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| MAYOR AND CITY COUNCIL OF BALTIMORE,<br><br>Plaintiff,<br><br>vs.<br><br>BP P.L.C.; *et al.*,<br><br>Defendants. | Case Number: 1:18-cv-02357-ELH |

**PLAINTIFF MAYOR AND CITY COUNCIL OF BALTIMORE'S OPPOSITION TO DEFENDANTS' MOTION TO EXTEND THE STAY PENDING APPEAL**

## I. INTRODUCTION

This Court's Memorandum Opinion and Order granting Plaintiff Mayor and City Council of Baltimore's (the "City") Motion to Remand, *see* Docs. 173 & 183,[1] rejected every argument in support of federal subject matter jurisdiction asserted by Defendants BP P.L.C. et al. (collectively "Defendants"), including their invocation of federal officer removal under 28 U.S.C. § 1442. The Court's thorough analysis correctly concluded that the City's Maryland law claims were "not properly removed to federal court." Order at *23. The Court stayed implementation of the Order for thirty days, to enable Defendants to notice their appeal from the Order to the Fourth Circuit Court of Appeals, *see* Doc. 173, and has granted the Parties' stipulation to extend that stay while the Court considers the Defendants' extant motion to extend the stay during the course of the Defendants' appeal, *see* Doc. 185 (June 24, 2019). For the reasons herein, the Court should deny

[1] The Court's Memorandum Opinion is cited and quoted herein by referenced to the Westlaw database citation: *Mayor & City Council of Baltimore v. BP P.L.C.*, No. CV ELH-18-2357, 2019 WL 2436848 (D. Md. June 10, 2019), *as amended* (June 20, 2019) ("Order").

Defendants' Motion to Stay Pending Appeal ("Mot.") and execute remand to Maryland Circuit Court without further delay.

The question now before this Court is whether Defendants have met their heavy burden of establishing their entitlement to an equitable stay of all further proceedings in these cases, which have been pending for nearly a year without any progress as a result of Defendants' meritless removal petitions, until the Fourth Circuit can decide whether this Court was correct in its jurisdictional analysis. Defendants contend that the Fourth Circuit will be required to consider *all* of their jurisdictional arguments because this Court's rejection of *one* of those arguments—their dubious assertion of federal officer jurisdiction—is appealable as of right. *See* 28 U.S.C. § 1447(d) ("An order remanding a case . . . 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 [providing for federal officer jurisdiction] or 1443 [providing removal jurisdiction in civil rights cases]. . . shall be reviewable"). The Fourth Circuit rejected that interpretation of § 1447(d) more than forty years ago. *See Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976). But even if Defendants' tail-wagging-the-appellate-dog argument were correct, *i.e.*, even if the Fourth Circuit must address the merits of every arguable basis for removal simply because one of those grounds rests upon a baseless assertion of "federal officer" jurisdiction, Defendants have not made the requisite showings that (1) they are likely to succeed on appeal, (2) they will be irreparably harmed, and (3) the balance of equities tips in their favor.

Preliminary litigation activities in state court present a minimal burden to Defendants. In contrast, the burden on the City of suffering an additional one or two years of delay before it can even *begin* to obtain discovery or to pursue its state law rights before state court tribunals (on top of the long delays already caused by Defendants' procedural roadblocks) is substantial and

irreparable. For these reasons, the Court should exercise its discretion to refuse a "departure from the beaten track" and continue proceedings on their ordinary course. *See Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936) (Cardozo, J.).

## II. 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). The moving party bears 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*, 2012 WL 6055452, *3 (D.S.C. Nov. 16, 2012), *report and recommendation adopted*, 2012 WL 6085245 (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*, 2014 WL 3616380, *2 (July 21, 2014) (quoting *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009), *judgment vacated on other grounds*, 559 U.S. 1089 (2010)).[2] The first two factors are the "most critical." *Niken*, 556 U.S. at 434.

[2] Courts in the Fourth Circuit formerly applied the more lenient test articulated in *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970), cited by Defendants, when considering motions to stay

## III. 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 of relief is required." *Nken*, 556 U.S. at 434 (citations and punctuation omitted).

Here, Defendants had no legitimate basis for asserting federal officer jurisdiction, which is the only argument among their "proverbial 'laundry list' of grounds for removal" that is subject to appellate review. *See* Order, 2019 WL 2436848 at *2. "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

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pending appeal. In *Real Truth About Obama*, however, the Fourth Circuit clearly 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 district courts have held that standard in turn applies to motions to stay. 575 F.3d 342, 345–47 (4th Cir. 2009), *cert. granted, judgment vacated on other grounds*, 559 U.S. 1089 (2010) ("[T]he standard articulated in *Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts."); *In re Schweiger*, 578 B.R. 734, 737 (Bankr. D. Md. 2017) ("Although the Fourth Circuit has not yet addressed the application of *Winter* to a stay pending appeal, other courts in the circuit have held that the *Winter* standard applies to the determination of whether to grant a stay pending appeal.") (collecting cases). While the elements of the *Long* and *Real Truth* tests largely overlap, "factor three in the *Long* test requires the movant to show that the other party will not be 'substantially harmed,' while in the *Real Truth* test the movant must show that 'the balance of equities tip in his favor.'" *Rose v. Logan*, 2014 WL 3616380, *2 (July 21, 2014). "The *Real Truth* test is also more difficult to satisfy than the *Long* test because the movant must satisfy all four requirements." *Id.*; *see also Coler v. Draper*, 2012 WL 5267436, *3 (Oct. 23, 2012) (same).

otherwise." *See* 28 U.S.C. § 1447(d). Although § 1447(d) allows Defendants to appeal this Court's rejection of the federal officer theory, the Fourth Circuit would likely conclude that a defendant's assertion of a meritless federal officer argument does not trigger mandatory appellate review of all other grounds for removal that are otherwise non-reviewable. Indeed, the Fourth Circuit has already expressly so held with respect to the remand orders rejecting removal under the virtually identical civil rights removal statute, § 1443. *See 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)."); *see also, e.g.*, *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006) (limiting review to the basis for removal for which § 1447(d) authorized appeal); *Jacks v. Meridian Res. Co.*, 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, both of which explicitly provide for appeal).

Defendants' hurried suggestion that the Court's entire Order is reviewable on appeal because they included a federal officer argument among their numerous meritless bases for federal jurisdiction is not supported by any of their citations. In *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, the Fourth Circuit had jurisdiction over the district court's granting remand to state court because federal officer jurisdiction was the *only* asserted basis for removal. 865 F.3d 181, 185–86 (4th Cir. 2017) ("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."). Likewise, in *Wood v. Crane Co.*, the only basis for federal jurisdiction was federal officer removal, so the district court's order granting remand after the plaintiff abandoned the claims that originally gave rise to federal officer jurisdiction was reviewable. 764 F.3d 316, 318, 320 (4th Cir. 2014)

("Crane removed the case to federal court under the federal officer removal statute. . . . This case was originally removed pursuant to § 1442(a)(1) and is thus reviewable."). Neither case stands for the proposition that when a defendant improperly removes under the federal officer statute and remand is granted, the defendant may appeal *other* meritless bases for removal jurisdiction that were rejected along with the federal officer argument, which is foreclosed by *Noel*. Finally, Defendants contention that *Noel* does not survive the Removal Clarification Act of 2011, Pub. L. 112-51, 125 Stat. 545 & 546, finds no basis in reality or any case law. The Act amended § 1447(d) only by inserting "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 adding § 1442. Defendants offer no reason why it would be.[3]

But, ultimately, it makes no difference whether the Fourth Circuit reviews only the federal officer issue or every issue upon which Defendants removed this case. Even if the Fourth Circuit could consider the merits of Defendants' other jurisdictional arguments, it would likely reach the same conclusion as this Court: The City has asserted exclusively Maryland law claims, which should be decided under Maryland law principles, in Maryland state court. While Defendants place great stock in a contrary conclusion from a district court on the West Coast that never actually examined the issues, this Court's Remand Order specifically addressed and rejected the bases for that conclusion, and there is a substantial likelihood that the Fourth Circuit will adopt this Court's

[3] Finally, 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 the other circuit authority was split. Here, the Fourth Circuit *has* ruled, and it has ruled against Defendants' position. This Court is bound by the clear holding in *Noel*.

analysis—whether it rules on the federal-officer question only or on all of Defendants' meritless arguments.

Although the Court undoubtedly has its legal analysis of the federal jurisdictional issues well in mind, we summarize below the reasons why the Court got it right. Even if Defendants could show a reasonable likelihood of appellate success, they have not come close to demonstrating irreparable harm in the absence of a stay, let alone that the equities tip in their favor, as discussed *infra* at III.B–C.

**1. There Is No Basis for Fed Removal Under 28 U.S.C. § 1442.**

Defendants aver that their appeal "presents substantial legal questions" with respect to their removal under 28 U.S.C. § 1442, which, not coincidentally, is the only argument that could trigger Fourth Circuit review of the Court's Order. For the reasons this Court has already stated, Defendants have "failed to plausibly assert that the acts for which they have been sued were carried out 'for or relating to'" any federal authority. Order, 2019 WL 2436848 at *18. Defendants offer no reason to believe the Fourth Circuit would view their argument any more favorably. They instead rehearse the arguments and facts already considered and rejected by this Court and by the only other district court to have ruled on them. *See also Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018) (rejecting defendants' "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"). Doing so 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 Court concluded that even assuming *arguendo* the other elements of federal officer removal were satisfied, 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." Order, 2019 WL 2436848 at *18. Specifically, Plaintiffs challenge Defendants' boardroom decisions to withhold information about the dangers inherent in their products and promote unlimited extraction of oil and gas. As this 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.*

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 change this Court's conclusion 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 the requisite nexus between federal control and the City's claims during *any* period.

Defendants offer no reason why the Fourth Circuit would evaluate the merits of their federal-officer argument any differently. They make no assertion, let alone an adequate showing, that they are likely to prevail on appeal. Because this is the only basis on which Defendants' may seek review, a stay pending appeal of this Court's ruling would be inappropriate.

**2. There Is No Basis for Removal Based on Federal Common Law.**

Defendants' lukewarm assertion that there exists a "substantial legal question" whether the City's claims "arise under federal common law" does not add any substantive argument or

intervening law, and instead cites the same decisional authority that has been before the Court throughout the parties' briefing. Defendants rely principally on Judge Alsup's order in *California v. BP P.L.C., et al.*, No. C 17-06011 WHA, 2018 WL 1064293, (N.D. Cal. Feb. 27, 2018) ("Alsup Order"), in renewing their contention that the City's exclusively Maryland law claims are "governed by" and thus "necessarily arise under federal common law." Mot. to Stay at 7–8. But this Court carefully considered and rejected Judge Alsup's heavily criticized order, and ruled to the contrary. Order, 2019 WL 2436848 at *7–8, citing 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 by failing to apply the exclusive test required by the U.S. Supreme Court, ***Error! Bookmark not defined.****Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005), for determining whether federal question jurisdiction lies over a well-pleaded state law complaint. Moreover, the only court to have squarely addressed this preemption issues presented here – Judge Chhabria in *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) – reached the same conclusion as this Court.

Except in the rare circumstance described in **Error! Bookmark not defined.***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 or subject to a potential federal defense. *See, e.g.*, *Pinney v. Nokia*, 402 F.3d 430 (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."); *Flying Pigs, LLC v. RRAJ Franchising, LLC*, 757 F.3d 177, 182 (4th Cir. 2014) ("[A] plaintiff's right to relief for a given claim necessarily depends on a

question of federal law only when *every* legal theory supporting the claim requires the resolution of a federal issue."); *Dixon*, 369 F.3d at 817 (4th Cir. 2004) (emphasis added) ("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.").

The City's claims for relief arise entirely under Maryland law; federal law does not form a necessary element of any of City's claims. *See, e.g.*, Plaintiffs' Motion to Remand, Doc. 147-1 at 24–25 n.10 (listing Maryland common law and statutory bases for each of the City's claims). Defendants do not engage whatsoever with the Court's holding that their "arising under federal common law" argument is a "cleverly veiled preemption argument." Order, 2019 WL 2436848 at *6. They do not reference preemption (ordinary or complete) *at all* in discussing federal common law, despite that being the focus of the Court's analysis. *See* Mot. at 7–9. Defendants do not seriously defend their position or challenge the 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.

**3. There Is No Basis for Removal Under the OCSLA.**

Defendants' contention that they have a "substantial argument" for jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA") relies on a wholly inapposite opinion of the Supreme Court that issued last month that did not involve removal or jurisdiction. In the *Parker Drilling Management Services, Ltd. v. Newton* case, the plaintiff worked on drilling platforms off the California coast, and filed a class action alleging violations of several California wage-and-hour laws and related state law claims based on the work that he and others physically performed on those platforms. ___ U.S.___, 139 S.Ct. 1881, 1886 (June 10, 2019). The defendant removed the case to federal court, and moved for a judgment on the pleadings. *Id.* There is no indication

that the plaintiff contested removal, and the parties agreed that plaintiffs' work on defendant's platforms were subject to the OCSLA. *Id.* Under OCSLA, the laws of adjacent states are deemed to be federal law "[t]o the extent that they are applicable and not inconsistent with" other federal law. 43 U.S.C. § 1333(a)(2)(A). The issue before the Court in *Parker* was whether California wage and hour law applied on the OCS in addition to the federal Fair Labor Standards Act. *Id*. Defendants' themselves correctly characterize the matter before the court as a "*choice of law* 'question under the OCSLA,'" and not one relating to the propriety of removal jurisdiction. Mot. at 9 (emphasis added). *Parking Drilling* simply has no bearing on whether the City's state law claims here were removable, where "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 the City's claims for injuries stemming from climate change would not have occurred but for defendants' extraction activities on the OCS." Order, 2019 WL 2436848 at *16. Nothing in *Parker* creates a strong likelihood that Defendants' will succeed in their appeal, and all other arguments Defendants raise in support of OCSLA jurisdiction were already considered and rejected by this Court. Mot. at 9–10.

**4. There Is No Basis for Federal Question Removal Under *Grable*.**

Defendants have no meaningful chance of success under *Grable,* because controlling authority squarely forecloses their arguments, and their anemic contention that a "reasonable jurists could disagree" about the removability of the City's claims, Mot. at 10, does not meet their burden. First, as the Court correctly ruled, Defendants' voluminous submissions "have failed to establish . . . that a federal *issue* is a 'necessary element' of the City's state law claims." Order, at *11; *see also id*. at 9–11 (rejecting all Defendants' arguments in favor of embedded federal question jurisdiction); *Gunn v. Minton*, 568 U.S. 251, 259 (2013); *Franchise Tax Bd. of State of*

*Cal. v. Constr. Laborers Vacation Tr. for S. California*, 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"). Defendants' one-paragraph defense of their *Grable* argument adds no authority not already considered by the Court, and they cite inapposite authority already distinguished in the City's briefing. *See* Mot. at 10; Mot. for Remand at 26–27.

Because Plaintiffs' 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, e.g.*, *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006), Defendants cannot establish any likelihood of appellate success on this ground either.

**5. There Is No Basis for Removal Based on Complete Preemption.**

Defendants' position that there is a serious legal question with respect to complete preemption by the Clean Air Act cannot be reconciled with the many cases rejecting complete preemption under the Act, or others rejecting even ordinary preemption defenses. *See* Mot. for Remand at 36–37 & nn. 17–18. As this Court pointed out in its Order, the Clean Air Act's savings clauses "unequivocally demonstrates that 'Congress did not intend the federal causes of action under [the Clean Air Act] to be exclusive.'" Order, 2019 WL 2436848 at *13 (quoting *San Mateo*, 294 F. Supp. 3d at 938) (punctuation omitted). Defendants do not identify any statutory provision or cite a single case in which the Clean Air Act completely preempted any state tort claims, and again cite only to case law already considered by the Court. Mot. at 11 n.6 (citing *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989). Moreover, defendants again repeat their mischaracterization of the City's Complaint, arguing that the City seeks to "regulate nationwide emissions." Mot. at 11. The City does not, anywhere in its complaint, seek relief that would regulate or constrain emissions, and the Court correctly held that

the CAA's private enforcement action was not intended to be "the exclusive remedy for injuries stemming from air pollution," and to the contrary "specifically preserves *other* causes of action" like the City's seeking localized abatement relief. *See* Order, 2019 WL 2436848 at *12–13. Without any authority to support their complete preemption arguments—and in the face of courts finding no complete preemption—Defendants fail to demonstrate the presence of a serious legal question, much less a likelihood of success on the merits that would warrant a stay

**6. Defendants Make No Serious Argument That They Are Likely to Prevail on the Merits of Their Other Jurisdictional Bases.**

Defendants devote at most a sentence or two to their remaining bases for removal, and none of their arguments are either new or persuasive. Defendants argue they have a strong likelihood of success on appeal on their federal enclave argument, because some courts "have concluded that federal enclave jurisdiction can lie when only a *portion* of the pertinent events occurred on federal enclaves." Mot. at 10. But as the Court correctly held, "[t]he Complaint does not contain any allegations concerning defendants' conduct on federal enclaves and, in fact, it expressly defines the scope of injury to exclude any federal territory." Order, 2019 WL 2436848 at *15. Defendants make no new citation or argument challenging that conclusion, and as such cannot meet their burden.

Defendants' two sentence, conclusory argument concerning bankruptcy simply states that "reasonable jurists could disagree" concerning whether the City's claims have a close nexus to Texaco's 30-year-old bankruptcy, and whether the City may invoke the public safety exception to the bankruptcy removal statute. Mot. at 11. Similarly, Defendants' assertion that reasonable jurists could disagree about whether admiralty jurisdiction exists over the City's claims does not engage any of the Court's analysis, and simply repeats the conclusion that fossil fuel "production conducted by vessels on navigable waters" not mentioned in the City's complaint has nonetheless

caused some portion of the City's injuries. *Id.* Conclusorily repeating rejected arguments cannot satisfy the Defendants' burden, and they have not come close to showing a strong likelihood of success on appeal.

**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 Sparks v. Oxy-Health, LLC*, No. 5:13-CV-649-FL, 2015 WL 7281623, at *2 (E.D.N.C. Nov. 16, 2015) ("The fact that some monetary harm will occur upon the denial of a stay is not a sufficient basis for granting the motion."); *Brea Union Plaza I, LLC v. Toys R Us, Inc.*, No. 3:18CV419, 2018 WL 3543056, at *5 (E.D. Va. July 23, 2018) ("[T]his Court cannot determine, on the record before it, that future and speculative costs to [movant] would constitute 'irreparable' harm . . . .")

Defendants' appeal of the Order under 28 U.S.C. § 1447(d) would not become "meaningless" without a stay. *See* Mot. at 12. Nothing that occurs in state court upon remand could moot or even affect Defendants' appeal. The cases Defendants primarily rely on arose in the very different context of orders to disclose documents that would be impossible to effectively claw back if released, thereby effectively 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"); *Hiken v. Dep't of Def.*, No. C 06-02812 JW, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (disclosure of information with "important national security implications" would moot appeal).[4] In the unlikely event the Fourth Circuit were to reverse this Court's Order, the state court proceedings would be suspended, the cases would return to this Court, and discovery and other pre-trial proceedings would presumably pick up exactly where they were left by the state court judges.

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 spend substantial time and money litigating . . . ." Mot. at 13. 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. No incremental burden could possibly result from having the discovery process in these cases supervised by a Maryland Circuit Court rather than by a Federal District Court.

The case of *E. Tennessee Nat. Gas Co. v. Sage*, 361 F.3d 808, (4th Cir. 2004), to which defendants cite, is a far cry from this case. There, the plaintiff gas company sought a preliminary injunction to obtain immediate possession of eminent domain rights, provided under the Natural

[4] Similarly, the *Ohio Valley Envtl. Coal. v. United States Army Corps of Engineers* case involved a request to stay an order that both remanded the plaintiff's claims to state court *and* ordered the Army Corps of Engineers to re-issue an amended public notices concerning permits requested by the coal company intervenor-defendants. No. CV 3:08-0979, 2010 WL 11565166, at *2 (S.D.W. Va. May 4, 2010) The court granted a stay in part because "remand *and re-notice of the coal companies' permits* would, as a practical matter, moot [the coal companies'] respective appeals" from the order and cause irreparable harm. *Id.* at *4. Here, there are no substantive obligations that Defendants will likely face if a stay is withheld. Finally, while the court in *CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC*, held that "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)

Gas Act, over dozens of properties that were in the path of a ninety-four-mile long natural gas pipeline. *Id.* at 818–20. Because the gas company had to meet multiple deadlines and steps to complete the construction, which had already begun, and because not issuing a preliminary injunction as to any single parcel would require the company "to build up to a parcel of land [it] do[es] not possess, skip that parcel, and then continue on the other side," the costs and obstacles caused by delay would indeed be irreparable. *Id.* at 828–29. Those facts are nothing like this case, where litigating in state court will not delay or prevent any ongoing projects, let alone a major piece of public infrastructure like that at issue in *Sage*. *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1125 (9th Cir. 2008), is likewise inapposite. There, the court identified the irreparable and "otherwise avoidable financial costs" to San Francisco citizens who would have lost healthcare coverage had the court not stayed its ruling—a far cry from "mere litigation expense," which is not irreparable harm. *See Renegotiation Bd.*, 415 U.S. at 24; *cf. Nken*, 556 U.S. at 434–35 (deportation, by itself, not sufficiently irreparable harm to support stay).

Defendants cannot dispute that whatever discovery may be obtained in state court would continue to be useful and relevant in the unlikely event these cases return to federal court. 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). 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). In sum, Defendants have not demonstrated the requisite irreparable harm, and for that reason alone, this Court must deny Defendants' motion, regardless of their proof regarding the other stay factors.

### C. The Balance of Harms Weighs Sharply in Favor of The City.

A stay would prevent the City from seeking prompt redress of its claims. Proceedings have already been delayed by nearly a year since the City filed its Complaint on July 20, 2018. *See* Doc. 2-1 (July 31, 2018). Although Defendants argue that a stay would avoid costly and potentially duplicative litigation, 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 public interest does not support Defendants' continued interference with state court proceedings either. *See Maui Land & Pineapple Co. v. Occidental Chem. Corp.*, 24 F. Supp. 2d 1083 (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").

Because Defendants have not demonstrated a strong likelihood of success on the merits, they must show both that their appeal raises serious legal questions and that the balance of hardships tips sharply in the City's favor. Defendants have made no such showing, and the Court should therefore deny their requested stay.

## IV. CONCLUSION

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

Dated: July 8, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that, on the 8th day of July, 2019, the foregoing document was filed through the ECF system and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

*/s/* Victor M. Sher
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