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)

DEFENDANTS' MOTION TO STAY PENDING APPEAL

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INTRODUCTION[1]

This Court should enter a stay pending appeal of the district court's order granting the motion of Mayor and City Council of Baltimore ("Plaintiff") to remand this action to state court. Fed. R. App. P. 8(a)(2)(ii).[2] This case is one of thirteen nearly identical cases currently pending in federal courts around the country in which various government entities have asserted global warming claims against companies in the fossil fuel industry.[3] All but one of these actions were filed in state court and removed to federal court, and all of them are now either on appeal before a U.S. Court of Appeals or stayed. Defendants have argued in each case that federal common law—not state law—necessarily governs claims based on the alleged effects of worldwide greenhouse gas emissions and fossil fuel production. Two

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[1] Pursuant to Local Rule 27(a), counsel for Plaintiff was informed of Defendants' intent to file this motion. Plaintiff opposes the motion.

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

[3] *See Cty. of San Mateo v. Chevron Corp*, No. 17-cv-4929 (N.D. Cal.); *City of Imperial Beach v. Chevron Corp.*, No. 17-cv-4934 (N.D. Cal.); *Cty. of Marin v. Chevron Corp.*, No. 17-cv-4935 (N.D. Cal.); *Cty. of Santa Cruz v. Chevron Corp.*, No. 18-cv-450 (N.D. Cal.); *City of Santa Cruz v. Chevron Corp.*, No. 18-cv-458 (N.D. Cal.); *City of Richmond v. Chevron Corp.*, No. 18-cv-732 (N.D. Cal.); *City of Oakland v. BP P.L.C.*, No. 17-cv-6011 (N.D. Cal.); *City and Cty. of San Francisco v. BP P.L.C.*, No. 17-cv-6012 (N.D. Cal.); *Pacific Coast Fed. of Fishermen's Ass'ns v. Chevron Corp.*, No. 3:18-cv-07477 (N.D. Cal.); *State of Rhode Island v. Chevron Corp.*, No. 1:18-cv-00395-WES-LDA (D. R.I.); *King County v. BP P.L.C.*, No. 2:18-cv-00758-RSL (W.D. Wash.); *City of New York v. BP P.L.C.*, No. 18-cv-00182-JFK (S.D.N.Y.).

district judges agreed, holding that global warming claims arise under federal law, regardless of whether the plaintiffs affix state law labels to their claims. *See California v. BP P.L.C.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*BP*"); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018). A third district judge held that federal common law does *not* govern plaintiffs' global warming claims, defeating removal, *see County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018)—but that judge stayed the remand pending appeal to ensure that the defendants' appellate rights were not rendered meaningless by intervening state court proceedings. A fourth district judge remanded global warming claims for similar reasons as the district court in this case, but stayed the remand for 60 days to allow the "parties time to brief and the Court to decide whether a further stay pending appeal is warranted." *Rhode Island v. Chevron Corp.*, 2019 WL 3282007, at *6 (D. R.I. July 22, 2019).

These divergent district court orders confirm that Defendants' appeal raises serious legal questions about which reasonable jurists can disagree. Furthermore, Defendants have a statutory right to appeal because they removed these cases under, *inter alia*, 28 U.S.C. §1442(a), the federal officer removal statute. That right would be rendered meaningless absent a stay because Defendants would be forced to litigate this case in state court for the entire pendency of the appeal. Courts routinely stay remand orders pending appeal to prevent the "rats nest of comity and federalism

issues" that would result from the reversal of a remand order after months (or even years) of litigation in state court. *Northrop Grumman Tech. Servs., Inc. v. DynCorp. Int'l, LLC*, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). Accordingly, this Court should stay the remand pending appeal to relieve the parties of the substantial burden of litigating this case on parallel tracks.

STATEMENT OF FACTS

On July 20, 2018, Plaintiff filed a complaint in Maryland state court against 26 energy companies, alleging that Defendants' worldwide "extraction, refining, and/or formulation of fossil fuel products … is a substantial factor in causing [global warming]," which Plaintiff claims is causing it ongoing injury. Ex.A ¶193; *id.* ¶195. The complaint purports to assert Maryland state 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. Ex.A ¶¶218-98. Plaintiff seeks, among other things, compensatory and punitive damages, disgorgement of profits, and equitable relief to abate the alleged nuisance. *Id.* Prayer for Relief at 130.

Defendants Chevron Corp. and Chevron U.S.A., Inc. removed this action to the Federal District Court for the District of Maryland on July 31, 2018. Ex.B. The notice of removal asserted that Plaintiff's claims are removable because they: (1) "are governed by federal common law," *id.* at 4; (2) "raise[] disputed and substantial

federal questions," *id.* at 6; (3) "are completely preempted by the CAA and/or other federal statutes and the United States Constitution," *id.* at 6-7; (4) arise out of conduct undertaken on the Outer Continental Shelf ("OCS"), and thus are removable under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §1349, *id.* at 7; (5) arise out of conduct undertaken at the direction of federal officers, *id.*; (6) "are based on alleged injuries to and/or conduct on federal enclaves," *id.*; (7) "are related to cases under Title 11 of the United States Code," *id.*; and (8) "fall within the Court's original admiralty jurisdiction under 28 U.S.C. §1333," *id.* at 8.

Plaintiff moved to remand on September 11, 2018. On June 10, 2019, Judge Hollander granted the motion without hearing argument. Ex.C. Pursuant to the parties' stipulation, the district court stayed the remand for thirty days. *Id.* at 3. On June 12, 2019, Defendants filed a notice of appeal. Ex.D.

On June 23, 2019, Defendants filed a motion in the district court to stay the remand pending appeal, No. 18-cv-02357, ECF No. 183, and the parties stipulated to stay the remand until the district court had resolved that motion. *Id.*, ECF No. 184. The stipulation also provided that the remand would be stayed pending resolution of any motion to stay filed in this Court. *Id*.

On July 31, 2019, the district court denied Defendants' motion to stay. Ex.E. Although the district court "agree[d] that the removal of this case based on the application of federal law presents a complex and unsettled legal question," *id*. at 5,

it concluded that §1447(d) authorizes review *only* of the federal officer removal question, *id.* at 5-9. And it concluded that Defendants' appeal did not present a serious legal question as to the propriety of removal on that ground. *Id.* at 8-9. The court also concluded that the other stay factors did not justify a stay. *Id.* at 9-11.

ARGUMENT

In considering a motion to stay pending appeal, the Court must weigh whether (1) Movants can show they will likely prevail on the merits of the appeal, (2) Movants will suffer irreparable injury if the stay is denied, (3) a stay will not substantially harm other parties, and (4) a stay is in the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see also Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970) (same). Where, as here, the government is the opposing party, the third and fourth factors "merge" and should be considered together. *Nken*, 556 U.S. at 435.

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

To establish that they are "likely to succeed on the merits," Defendants must "establish[] sufficiently that their appeal presents a substantial legal question on the merits." *Brinkman v. John Crane, Inc.*, 2015 WL 13424471, at *1 (E.D. Va. Dec. 14, 2015); *see also Wash. 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 "there is a distinct possibility a panel of judges on the Fourth Circuit may reach

a different conclusion than [the district court] on some of th[e] difficult issues" in the case. *Zhenli Ye Gon v. Holt*, 2014 WL 202112, at *1 (W.D. Va. Jan. 17, 2014). That standard is satisfied here.

A. Defendants Have Presented a Substantial Case on the Merits That Removal is Proper under the Federal Officer Removal Statute.

Defendants removed this case under the federal officer removal statute, 28 U.S.C. §1442(a), and thus have a statutory right to appeal. *See* 28 U.S.C. §1447(d); *Northrop Grumman Technical Servs., Inc. v. DynCorp Int'l, LLC*, 865 F.3d 181, 186 n.4 (4th Cir. 2017). Section 1442(a)(1) authorizes removal of suits brought against "any person acting under" a federal officer "for or relating to any act under color of such office." 28 U.S.C. §1442(a)(1). The words "or relating to"—added by the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545—"'broaden[ed] the universe of acts' that enable federal removal." *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017) (quoting H.R. Rep. 112-17, 6, 2011 U.S.C.C.A.N. 420, 425). Following that amendment, a party seeking federal officer removal must demonstrate only that "(1) it acted under a federal officer; (2) it has a colorable federal defense; and (3) the charged conduct was carried out for or in relation to the asserted official authority." *Id.* at 254.

Plaintiff alleges that Defendants' extraction and production of fossil fuels have contributed to the global warming-based injuries it asserts. Ex.A ¶193. At least some of the Defendants extracted, produced, and sold fossil fuels at the

direction of federal officers. *See* Ex.B ¶¶61-64, ECF No. 74 ("JA") at 246 §1.a; JA.250 §4(b)); JA.234 §9. The Supreme Court has indicated that a private contractor "acts under" the direction of a federal officer when it "help[s] the government to produce an item that it needs" under federal "subjection, guidance, or control." *Watson v. Phillip Morris Cos.*, 551 U.S. 142, 151, 153 (2007).

The district court assumed that Defendants could meet the first two requirements, but held that removal was improper because Defendants' conduct under federal direction was not sufficiently connected to Plaintiff's claims. Ex.C at 36-37 (holding that Defendants "have not shown that a federal officer controlled their *total* production and sales of fossil fuels."). But to satisfy the nexus requirement, a defendant must show "only that the charged conduct *relate[s]* to an act under color of federal office." *Sawyer*, 860 F.3d at 258 (emphasis added). Other courts have held that the type of contractual obligations established by Defendants support federal officer removal, even when only a portion of the allegedly tortious activity occurred under the direction of federal officers. *See, e.g.*, *Reed v. Fina Oil & Chem. Co*., 995 F. Supp. 705, 712 (E.D. Tex. 1998) ("nexus present during" the "ten years" plaintiff worked under federal direction was "sufficient to support §1442(a)(1) removal" even though plaintiff alleged harm due to exposure to a chemical produced by the defendant over a 35-year period); *Lalonde v. Delta Field Erection*, 1998 WL 34301466, at *6 (M.D. La. Aug. 6, 1998) (defendant's work

under the direction of the government for eleven years established a "causal connection" between the claims and the defendants' conduct, notwithstanding the two decades during which the defendant was not acting under the control of a federal officer). There is thus a substantial legal question as to whether there is a causal nexus between Plaintiff's alleged injuries and the conduct that some Defendants undertook at the direction of federal officers.

The district court also held that federal officer removal was improper because the government did not direct Defendants "to conceal the hazards of fossil fuels or prohibit[] them from providing warnings to consumers." Ex.C at 36. But Plaintiff has asserted claims for public and private nuisance, strict liability and negligent design defect, and trespass—causes of action that turn on Defendants' alleged extraction and production, not their promotional or lobbying activities. Ex.A ¶¶218-36, 249-69, 282-90. There is, at minimum, a serious legal question as to whether removal is proper where one of the primary "acts for which [Defendants] have been sued," Ex.C at 37, was taken in part at the direction of federal officers.

The district court's reliance on two other decisions rejecting removal of similar claims under §1442 also does not support a stay. Ex.E at 8 (citing *San Mateo*, 294 F. Supp. 3d at 939; *Rhode Island*, 2019 WL 3282007, at *5)). Both courts asserted that removal under §1442 was improper because some of the challenged conduct—such as Defendants' promotion—was not controlled by federal officers.

But as this Court has explained, "there need be only 'a *connection or association* between the act in question and the federal office.'" *Sawyer*, 860 F.3d at 258 (emphasis in original).

B. This Court Can Consider Every Ground for Removal Rejected by the District Court, Each of Which Raises a Serious Legal Question.

Defendants' notice of removal also asserted that Plaintiff's global warming claims arise under federal common law and thus are removable under 28 U.S.C. §1441. The district court agreed that this basis for removal raises a serious legal question, but denied a stay because, *inter alia*, it believed that this Court would limit its review to the federal officer removal ground. Ex.E at 5-8. But the plain text of 28 U.S.C. §1447(d) makes remand *orders*—not particular grounds for removal—reviewable on appeal where, as here, a case is removed under §1442. *See* 28 U.S.C. §1447(d) ("*an order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title *shall be reviewable* by appeal or otherwise") (emphases added).

As the Seventh and Sixth Circuits have recently recognized, "[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); *see also Mays v. City of Flint, Michigan*, 871 F.3d 437, 442 (6th Cir. 2017) (following *Lu Junhong*); 15A Wright et al., Fed. Prac. & P. §3914.11 (2d ed.).

The Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), supports this interpretation of §1447(d). *Yamaha* involved the proper interpretation of 28 U.S.C. §1292(b), which provides that when an "order involves a controlling question of law as to which there is substantial ground for difference of opinion," the court of appeals may "permit an appeal to be taken from such order." Addressing the scope of review, the Court held that "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)).

The same logic applies to §1447(d). Although removal under §1442 is a necessary predicate for an appeal—just as a controlling question of law is a necessary predicate for an appeal under §1292(b)—once this predicate is satisfied, the court of appeals has jurisdiction to review the whole "order." Accordingly, Defendants' federal common law argument—as well as every other ground for removal—is squarely presented on appeal.

The district court concluded that this plain-text interpretation of §1447(d) was barred by Fourth Circuit precedent. Ex.E at 7 (citing *Noel v. McCain*, 538 F.2d 633

(4th Cir. 1976)). To be sure, *Noel* stated that "[j]urisdiction to review remand of a §1441(a) removal is not supplied by also seeking removal under §1443(1)," 538 F.2d at 635 (citing *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970), but *Noel* predated *Yamaha* and the Removal Clarification Act of 2011, in which Congress amended §1447(d) to allow review of remand orders in cases removed under §1442 (previously, only remand orders in cases removed under §1443 were reviewable). Pub. L. No. 112-51, 125 Stat. 545 (2011). And *Noel* relied on the Sixth Circuit's decision in *Appalachian Volunteers* to reach its jurisdictional conclusion, but the Sixth Circuit has recently taken the opposite view. *See Mays*, 871 F.3d at 442.

The Ninth Circuit's treatment of the jurisdictional issue also supports a stay here. In *San Mateo*, the plaintiffs moved to dismiss the appeal in part for lack of jurisdiction, citing a Ninth Circuit decision that, like *Noel*, predated the Removal Clarification Act. A motions panel referred the appellate-jurisdiction issue to the panel assigned to decide the merits of the appeal. *See* Order, No. 18-15499, ECF No. 58 (9th Cir. Aug. 20, 2018). Similarly, here, the scope of appellate review under the current version of §1447(d) presents a substantial question warranting full briefing and oral argument. This Court should grant a stay to preserve the status quo pending a decision both on that issue and on the presence of federal jurisdiction over Plaintiff's claims.

Finally, to the extent *Noel* is still binding, Defendants' motion should still be granted because *Noel* is part of a circuit split on the issue of appellate jurisdiction in cases removed under §1442. *See* Ex.E at 7-8 (collecting cases). That is reason alone to grant a stay. *See In re Cintas Corp. Overtime Pay Arbitration Litig.*, 2007 WL 1302496, at *2-3 (N.D. Cal. May 2, 2007) (granting stay where "there [was] a substantial circuit split on [a] jurisdictional issue"). Given the likelihood that the Supreme Court will resolve the circuit split regarding the scope of appellate jurisdiction under §1447(d), Defendants request that, if the Court declines to grant a stay pending appeal, it extend the stay currently in effect for 14 days to allow Defendants to seek an emergency stay from the Supreme Court.

1. Defendants' appeal presents a substantial legal question as to whether Plaintiff's global warming claims arise under federal common law.

With the whole remand order under review, a stay is plainly warranted because, as the district court agreed, the federal common law ground of removal "presents a complex and unsettled legal question, as evidenced by the diverging opinions reached by other district courts that have considered the issue." Ex.E at 5; *see BP*, 2018 WL 1064293; *City of New York*, 325 F. Supp. 3d 466; *San Mateo*, 294 F. Supp. 3d 934; *Rhode Island*, 2019 WL 3282007.

In *BP*, the court denied a motion to remand global-warming claims filed by the City of Oakland and the City and County of San Francisco against five energy

producers—all of which are Defendants here. Similar to Plaintiff here, the plaintiffs in *BP* argued that the well-pleaded complaint rule barred removal because they had nominally asserted their claims under state law. 2018 WL 1064293, at *5. The court disagreed, holding that the "Plaintiffs' nuisance claims—which address the national and international geophysical phenomenon of global warming—*are necessarily governed by federal common law*." *Id.* at *2 (emphasis added). In reaching that conclusion, the court relied on a line of Supreme Court decisions holding that federal common law applies "to an interstate nuisance claim." *Id.*[4] It held that the well-pleaded complaint rule was no barrier to removal because the plaintiffs' "claims necessarily arise under federal common law." *Id.* at *5; *see Milwaukee I*, 406 U.S. at 100.

The court in *City of New York* reached a similar conclusion, where the plaintiff purported to assert state-law claims against the same five energy producers seeking

[4] *See Illinois v. City of Milwaukee*, 406 U.S. 91, 107 n.9 (1972) ("*Milwaukee I*") ("Federal common law and not the varying common law of the individual states is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain."); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) (Because "the regulation of interstate water pollution is a matter of federal, not state, law," interstate pollution disputes "should be resolved by reference to federal common law[.]"); *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*") (Environmental protection "is undoubtedly an area within national legislative power, one in which federal courts may fill in statutory interstices, and, if necessary, even fashion federal law.").

"damages for global-warming related injuries resulting from greenhouse gas emissions." 325 F. Supp. 3d at 472. The court held that the plaintiff's claims, though nominally pleaded under state law, "are ultimately based on the 'transboundary' emission of greenhouse gases, indicating that these claims *arise under federal common law* and require a uniform standard of decision." *Id.* (emphasis added). Although the City of New York filed its action in federal court on the basis of diversity, the district court's conclusion that plaintiff's purportedly state-law claims arose under federal common law was critical to its decision to dismiss.

In *San Mateo*, by contrast, the court granted the plaintiffs' remand motion, but for very different reasons than the district court adopted here. Whereas the district court below concluded that Defendants' removal arguments were barred by the well-pleaded complaint rule *regardless* of whether federal common law governs the claims, Ex.C at 12-19, the court in *San Mateo* remanded because it concluded that "federal common law does *not* govern" the claims. *San Mateo*, 294 F. Supp. 3d at 937.[5] Although the *San Mateo* court granted the plaintiffs' remand motion, it *sua sponte* certified its order for interlocutory review because it recognized that the

[5] The court in *San Mateo* based its conclusion on the Supreme Court's holding in *AEP* that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." 564 U.S. at 424. As Defendants have explained, however, displacement of federal common law does not affect subject matter jurisdiction, but only the availability of a *remedy*. ECF No. 73 at 31.

defendants' removal arguments involved "controlling questions of law as to which there is substantial ground for difference of opinion." *San Mateo*, No. 17-cv-04929 (N.D. Cal.), ECF No. 240. The court also stayed the remand pending appeal to the Ninth Circuit. *Id.*

In *Rhode Island*, the court agreed that "transborder air and water disputes are one of the limited areas where federal common law survived *Erie R. Co. v. Tompkins*," 304 U.S. 64 (1938), but concluded that "whether displaced or not, environmental federal common law does not—absent congressional say-so—completely preempt the State's public-nuisance claim, and therefore provides no basis for removal." 2019 WL 3282007, at *3. However, the court granted a 60-day stay of its remand order. *Id.* at *6. As a result, none of the other cases involving global warming claims nominally asserted under state law are currently proceeding in state court.

These conflicting decisions—which will be reviewed by the First, Second, and Ninth Circuits—confirm that Defendants' appeal to *this* Court presents serious legal questions about which reasonable jurists can disagree. *See United States v. Fourteen Various Firearms*, 897 F. Supp. 271, 271 (E.D. Va. 1995).

In "declin[ing] to endorse" removal based on federal common law, the district court also recognized "the absence of any controlling authority." Ex.C at 17; *see 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"). Accordingly, Defendants have shown a "substantial case on the merits," as their appeal "raises a number of complex questions and novel legal theories which the Fourth Circuit has yet to evaluate, and the case has potentially large downstream precedential consequences." *Northrop Grumman*, 2016 WL 3346349, at *3; *see Goldstein v. Miller*, 488 F. Supp. 156, 175 (D. Md. 1980) (granting stay where "there is little doubt that at least some of the issues raised in these cases present serious questions of first impression").

Defendants' appeal also presents a "substantial case on the merits" because this case addresses "matters of substantial national importance," such as whether federal or state courts are the appropriate forum for addressing claims based on global warming allegedly caused by worldwide conduct. *Project Vote/Voting for Am., Inc. v. Long*, 275 F.R.D. 473, 474 (E.D. Va. 2011).

2. Defendants' appeal presents serious legal questions as to whether removal was proper on several other grounds.

Defendants removed Plaintiff's global warming claims on several other grounds, each of which also supports federal jurisdiction. Defendants' appeal presents substantial legal questions as to whether Plaintiff's claims are removable on any of these grounds.

First, there is a legitimate issue as to whether Plaintiff's claims are removable under the "common-sense" inquiry set forth in *Grable & Sons Metal Products, Inc.*

v. Darue Engineering & Manufacturing, 545 U.S. 308, 312-13 (2005), which held that federal jurisdiction over a state law claim exists if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *Id.* at 313-14. Plaintiff's nuisance claims require a determination as to the "reasonableness" of Defendants' conduct, but federal law governs the cost-benefit analysis required by Plaintiff's nuisance claims, and several federal agencies have already concluded that Defendants' conduct is reasonable. *See* ECF No. 73 at 33-37.

Second, Defendants have a substantial argument that Plaintiff's claims were properly removed under the OCSLA, which extends federal jurisdiction to "cases and controversies arising out of, or in connection with … any operation conducted on the outer Continental Shelf which involves exploration, development, or production of … minerals." 43 U.S.C. § 1349(b)(1). *See* ECF No. 73 at 43-46. Plaintiff seeks to hold Defendants liable for *all* of their exploration for and production of oil and gas, and some defendants extracted a substantial portion of the oil and gas they produced on the OCS. Ex.B ¶¶ 55-56. *See Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019) ("Under the OCSLA, all law on the OCS is federal law.").

Moreover, the relief Plaintiff seeks—abatement of the alleged nuisance of oil and gas production—"threatens to impair the total recovery of the federally-owned minerals" from the OCS, which courts have held is sufficient for removal. *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 570 (5th Cir. 1994); *see also United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990).

Finally, the other removal grounds asserted by Defendants also raise substantial questions. *See* ECF No. 73 at 46-54.

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

Once the remand takes effect—*i.e.*, after the Clerk of Court for the District of Maryland mails the certified copy of the Remand Order to the Circuit Court for Baltimore City—"[t]he State Court may thereupon proceed with [the] case." 28 U.S.C. §1447(c). Even if this appeal can be resolved before the state court enters a final judgment, the district court would need to untangle any state court rulings made during the pendency of the appeal if this Court reverses, creating a "rat's nest of comity and federalism issues." *Northrop Grumman*, 2016 WL 3346349, at *4. These rulings would likely include multiple motions to dismiss on the merits and for lack of personal jurisdiction, as well as potential discovery rulings under state law.

Courts routinely grant motions to stay remand orders to avoid this exact risk. *See, e.g.*, *id*. at *3 (collecting cases).

Moreover, "[m]eaningful review entails having the reviewing court take a fresh look at the decision of the trial court *before* it becomes irrevocable." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (emphasis added). But without a stay, the state court could reach a final judgment before Defendants' appeal is finally resolved—especially if this Court follows *Noel*, the Supreme Court grants review and adopts the Seventh Circuit's interpretation of §1447(d), and this Court then reviews the entire remand order. *See Northrop Grumman*, 2016 WL 3346349, at *4 (defendant would suffer "severe and irreparable harm if no stay is issued" because an "intervening state court judgment or order could render the appeal meaningless"); *CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC*, 2013 WL 3288092, at *7 (E.D.N.C. June 28, 2013) ("[L]oss of appellate rights alone constitutes irreparable harm.").[6]

An immediate remand also would force Defendants—and Plaintiff—to spend substantial time and resources litigating in state court. The litigation costs Defendants will incur in state court proceedings cannot be recovered if this Court

[6] The district court asserted that an appeal being rendered moot does not constitute irreparable injury, Ex.E. at 9 (citing *Rose v. Logan*, 2014 WL 3616380 (D. Md. July 21, 2014)), but in *Rose* the Appellant's own conduct was "the cause of the irreparable injury he [was] claiming." 2014 WL 3616380, at *3. Not so here.

reverses. *See Citibank, N.A. v. Jackson*, 2017 WL 4511348, at *2-3 (W.D.N.C. Oct. 10, 2017) (granting motion to stay remand and noting that litigation costs would be avoided).

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

Where, as here, "the Government is the opposing party," the third and fourth factors (*i.e.*, harm to opposing party and the public interest) "merge" and should be considered together. *Nken,* 556 U.S. at 435. Here, a stay would not prejudice Plaintiff's ability to seek relief or meaningfully exacerbate Plaintiff's injuries. Indeed, according to Plaintiff, the harm is already "locked in" and will occur in the future "even in the absence of any future emissions." *See, e.g.*, Ex.A ¶¶7-8, 179-180, 196. A stay would also benefit Plaintiff by avoiding costly and potentially wasteful state court litigation should the Fourth Circuit ultimately conclude that this action belongs in federal court. *See Brinkman*, 2015 WL 13424471, at *1 (granting stay pending appeal so parties would not have to "face the burden of having to simultaneously litigate [the case] in state court and on appeal"). Moreover, even if Plaintiff's jurisdictional arguments are correct, "a stay w[ill] not permanently deprive [them] of access to state court." *Northrop Grumman*, 2016 WL 3346349, at *4.

A stay while the appeal is pending would also conserve judicial resources and promote judicial economy by unburdening the state court of potentially unnecessary

litigation. *See United States v. 2366 San Pablo Ave.*, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015). The district court speculated that "interim proceedings in state court may well advance the resolution of the case in federal court," Ex.E at 11, but the threshold question on appeal is *which law governs* Plaintiff's claims—federal common law or state law. Any state court ruling addressing the viability of the claims under Maryland law is unlikely to assist the district court in determining whether the claims can proceed under federal law. Additionally, because the discovery procedures and standards are different, any discovery disputes would likely have to be re-litigated in federal court. A stay is thus in the public interest.

CONCLUSION

For these reasons, Defendants respectfully request that the Court extend the stay of the Remand Order pending resolution of their appeal. At minimum, the Court should extend the stay by 14 days to allow Defendants to seek an emergency stay from the Supreme Court.

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Respectfully submitted,

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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 5,200 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 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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