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' REPLY IN SUPPORT OF MOTION TO STAY PENDING APPEAL

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INTRODUCTION

Defendants' appeal presents complex issues of federal jurisdiction that have divided district courts across the country and are also under review by the First and Ninth Circuits—a sure sign that the appeal presents "substantial legal questions," as the district court acknowledged. Ex.E at 5. Plaintiff contends that most jurisdictional issues addressed in the Remand Order are unreviewable, but a well-developed circuit split exists on that issue, and the 40-year-old circuit precedent Plaintiff relies on cannot be reconciled with the plain text of 28 U.S.C. §1447(d), as subsequently amended, or with intervening Supreme Court precedent. If anything, this thorny issue of appellate jurisdiction—which is also before the First and Ninth Circuits and may require Supreme Court resolution—only confirms the propriety of a stay.

Plaintiff's irreparable harm arguments are also unavailing. Without a stay, the state court may reach final judgment before Defendants' appeal is resolved. That prospect increases if Supreme Court review is necessary to resolve the scope of appellate review under §1447(d). A stay would avoid having the parties unnecessarily litigate complex motions to dismiss (and sundry other motions) premised on substantive state law in state court, then re-litigate them under federal law in federal court if Defendants prevail on appeal. And although Plaintiff contends discovery will proceed immediately whether the claims are litigated in state or

federal court, discovery in the district court will not commence until a scheduling order issues, typically after Rule 12 motions are resolved. Given the likelihood that the district court will dismiss Plaintiff's claims, a stay may obviate the need for *any* discovery.

Finally, although Plaintiff complains about delay, it identifies *no* harm that would result from a stay pending appeal. A stay would simply preserve the *status quo* until this Court decides which law governs Plaintiff's claims and where they should be litigated.

ARGUMENT

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

To show likely success on the merits, Defendants need only "establish[] … that their appeal presents a 'substantial legal question' on the merits." *Brinkman v. John Crane, Inc.*, 2015 WL 13424471, at *1 (E.D. Va. Dec. 14, 2015). This factor is 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 [these] difficult issues." *Zhenli Ye Gon v. Holt*, 2014 WL 202112, at *1 (W.D. Va. Jan. 17, 2014). That standard is met here.

A. Defendants Have Raised a Substantial Question as to Whether this Case Was Properly Removed Under the Federal Officer Removal Statute

The district court rejected removal under 28 U.S.C. §1442 because it concluded that Defendants had not shown that federal officers "directed [Defendants] to conceal the hazards of fossil fuels or prohibited them from providing warnings to consumers." Ex.C at 36. But as Plaintiff does not dispute, several of its claims do not turn on Defendants' alleged promotion or concealment, but instead are based solely on Defendants' *production of fossil fuels*, Mot.8, a significant portion of which occurred at the direction of federal officers. *See* Mot.7.

Plaintiff contends that Defendants have not established the requisite causal nexus "during any period" of time. Opp.12. But irrespective of whether federal officers controlled Defendants' "total production and sales of fossil fuels" for any particular period, Ex.C at 36, Plaintiff's complaint alleges that Defendants' *cumulative* fossil-fuel production, including all production at the direction of federal officers, caused its alleged injuries. *See* Mot.8. Plaintiff could have excluded this federally-controlled conduct from its Complaint, but did not. At minimum, Defendants' appeal raises a substantial question as to whether there is a "connection or association between the act in question"—fossil-fuel production—"and the federal office." *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017).

B. The Entire Remand Order is Reviewable on Appeal

Plaintiff contends that this Court has jurisdiction to review only federal officer removal. Opp.5. But §1447(d) unambiguously authorizes review of a remand "order" in cases removed under §1442 or §1443. As the Seventh Circuit recognized, "when a statute provides appellate jurisdiction over an order, 'the thing under review is the order,' and the court of appeals is not limited to reviewing particular 'questions' underlying the 'order.'" *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015) (Easterbrook, J.) (citing *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996)).

Plaintiff contends that Judge Easterbrook misread *Yamaha*, Opp.7, which held that when a district court certifies an order for interlocutory review under 28 U.S.C. §1292(b), "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." 516 U.S. at 205. But the Seventh Circuit's "application of *Yamaha* … to the word 'order' in §1447(d) … [was] entirely textual." *Lu Junhong*, 792 F.3d at 812. *Yamaha* clarified that when a statute authorizes appellate review of a district court order that would otherwise be unreviewable, the "appellate court may address any issue fairly included" in that "*order*." 516 U.S. at 205. The Seventh Circuit thus got it exactly right in concluding that when Congress makes "a district court's 'order' …

reviewable," the court of appeals has jurisdiction to review the "*whole* order," not just particular issues decided in that order. *Lu Junhong*, 792 F.3d at 811.

Plaintiff contends that *Yamaha*'s reasoning is not "sensible" in the context of §1447(d) because "Congress enumerated only two bases for removal that may be reviewed on appeal." Opp.8. But §1447(d) "was enacted to prevent appellate delay in determining where litigation will occur," not to immunize certain district court decisions from appellate review. *Lu Junhong*, 792 F.3d at 811. And "once Congress has authorized appellate review of a remand order—as it has authorized review of suits removed on the authority of §1442—a court of appeals has been authorized to take the time necessary to determine the right forum." *Id.*; *see also* 15A Wright *et al.*, *Fed. Prac. & Proc.* § 3914.11 (2014 rev.) ("Once an appeal is taken there is very little to be gained by limiting review[.]").

Plaintiff suggests that the word "order" should be given a different meaning in §1447(d) than in §1292(b) because §1447(d) "makes certain remand orders merely 'reviewable,'" while §1292(b) "directly authorizes appeals of a certified order." Opp.9. That distinction makes no sense. As Plaintiff has conceded, "an order remanding a case which had previously been removed under a claim of §1442 removability is a 'judgment' for purposes of the Federal Rules of Civil Procedure." *Northrop Grumman Tech. Servs. v. DynCorp Int'l LLC*, 2016 WL 3180775, at *2 (E.D. Va. June 7, 2016); *see* No. 18-cv-02357, ECF No. 162 at 2. The remand order

is thus appealable under 28 U.S.C. §1291, which, like §1292(b), "directly authorizes appeals" and imposes no restrictions on the issues that may be decided in the context of an appealable order. Opp.9.

As Plaintiff correctly notes, the Seventh Circuit's interpretation of §1447(d) would "allow an appeal *as of right* whenever a removing defendant has asserted federal officer jurisdiction," and "would permit review of issues … that are ordinarily expressly prohibited from appellate review at all." Opp.10. But those consequences flow directly from the statute's plain text; any policy disagreement with that outcome must be directed to Congress, not the Court.[1]

Given the statute's unambiguous text, the Supreme Court's decision in *Yamaha*, and Congress's recent amendment to §1447(d) in the Removal Clarification Act of 2011, *Noel v. McCain*, 538 F.2d 633 (4th Cir. 1976), is no longer good law. Nor is the Sixth Circuit decision on which *Noel* relied. *See Mays v. City of Flint, Michigan*, 871 F.3d 437, 442 (6th Cir. 2017) (following *Lu Junhong* and overruling *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970)). Plaintiff asserts that this Court recently "affirmed *Noel*'s holding limiting

[1] "[T]he only plausible concern" with the plain-text interpretation of §1447(d) "is that an expanded scope of review will encourage defendants to rely on strained arguments under [§1442 or] §1443 in an effort to support appeal on other grounds." 15A Wright et al., *Fed. Prac. & Proc.* §3914.11. But "[s]ufficient sanctions are available to deter frivolous removal arguments[.]" *Id.*; *see, e.g.*, *Wong v. Kracksmith*, 764 F. App'x 583, 584 (9th Cir. 2019) (affirming remand and district court's imposition of sanctions for filing "a frivolous notice of removal" under §1443).

the scope of review" in *Lee v. Murraybey*, 487 F. App'x 84 (4th Cir. 2012). Opp.6. But that unpublished *per curiam* decision provides no support for *Noel*'s supposed vitality because the pro se appellant did not even raise the scope of review on appeal. *See Lee*, No. 12-7159, ECF No. 10. Indeed, appellant's informal brief—the only appellate brief filed—did not even argue that the case was properly removed on grounds other than §1443. *Id.* This Court is thus free to reconsider *Noel*.[2]

C. Defendants' Appeal Presents Substantial Legal Questions Regarding Whether Removal was Proper on Several Other Grounds

The district court agreed that Defendants' federal common law ground for 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. That conclusion, which Plaintiff ignores, is plainly correct given that two district courts have concluded that global warming claims based on out-of-state emissions necessarily *arise under federal common law*. *See California v. BP P.L.C.*, 2018 WL 1064293, at *2 (N.D. Cal. Feb. 27, 2018); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 472 (S.D.N.Y. 2018). And contrary to Plaintiff's assertion that *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018), "reached the same conclusion as Judge Hollander here," Opp.14, the *San Mateo*

[2] In *San Mateo* a merits panel will consider whether it has jurisdiction to review the whole remand order notwithstanding *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006). Opp.5; *see* Mot.11.

court concluded that federal common law did not govern the plaintiffs' claims because the Clean Air Act displaced any federal common law remedy. 294 F. Supp. 3d at 937. That conclusion was incorrect, Mot.14 n.5, but for a different reason than the Remand Order, which erroneously concluded that the well-pleaded complaint rule barred removal of Plaintiff's claims. Ex.C at 12.

Plaintiff contends "there can be no federal question jurisdiction over a complaint that on its face alleges exclusively state law claims," Opp.14, but the cited cases did not address removal under federal common law. This Court has not yet squarely addressed the issue here—whether a claim arises under federal law for purposes of removal when federal common law necessarily governs the claim.

Defendants' appeal also presents substantial legal questions as to whether Plaintiff's claims were properly removed under *Grable*, OCSLA, and several other removal statutes and doctrines. Mot.16-18. Plaintiff argues that a stay is improper because the district court "already considered and properly rejected" Defendants' arguments on those removal grounds. Opp.15. But a movant need not demonstrate that the district court overlooked an issue to obtain a stay. Rather, a stay is warranted where the district court has "ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Ohio*

Valley Envtl. Coal. v. United States Army Corps of Eng's, 2010 WL 11565166, at *2 (S.D. W.Va. May 4, 2010). Defendants have amply satisfied that standard here.[3]

II. Defendants Will Be Irreparably Harmed Absent a Stay

If this Court denies Defendants' stay request, the state court could reach final judgment before Defendants' appeal is resolved—a likely scenario if the Supreme Court grants review to resolve the well-developed circuit split on the proper interpretation of §1447(d). Plaintiff does not dispute that a final judgment in state court would make the remand order effectively "irrevocable." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979). Moreover, where the question on appeal is whether Defendants should be forced to litigate *at all* in state court under state law, denying a stay and allowing the case to proceed would make the appellate right "an empty one." *Northrop Grumman*, 2016 WL 3346349, at *3; *see also* H.R. Rep. No. 112-17(I), pt. 1, at 2-4 (2011) (Removal Clarification Act of 2011 designed to prevent federal officers from being forced to litigate in state courts).

Plaintiff contends that proceedings "would presumably pick up exactly where they left off in state court" if Defendants' appeal is successful. Opp.19. But a threshold issue on appeal is *which law* governs Plaintiff's claims, and dispositive

[3] In any event, the district court did *not* consider Defendants' argument that a claim is removable under OCSLA when it "threatens to impair the total recovery of the federally-owned minerals" from the OCS. *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 570 (5th Cir. 1994); Ex.C at 32-34; Mot.18.

motions briefed in state court under state law would need to be re-briefed and re-argued in the district court under federal law if this Court reverses the Remand Order. Resources needlessly expended litigating in state court cannot be recovered and thus constitute irreparable harm.

Plaintiff also appears to assume it will obtain discovery before dispositive motions are resolved regardless of whether the case proceeds in state or federal court. Opp.20. But discovery in the district court does not commence until a scheduling order issues, and, generally, not until after Rule 12 motions are resolved. D. Md. L.R. 104.4; *see Wymes v. Lustbader*, 2012 WL 1819836, at *4 (D. Md. May 16, 2012) ("On motion, it is not uncommon for courts to stay discovery pending resolution of dispositive motions."); *Stone v. Trump*, 335 F. Supp. 3d 749, 754 (D. Md. 2018) ("When a dispositive motion has the potential to dispose of the case, it is within the Court's discretion to stay discovery pending resolution of that motion.").

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

A stay would not prejudice Plaintiff's ability to seek damages or other relief. Plaintiff's Complaint disclaims any desire "to restrain Defendants from engaging in their business operations," and merely "seeks to ensure that [Defendants] bear the costs of those impacts." Ex.A. ¶12. Plaintiff thus does not, and cannot, point to harm reasonably likely to occur during a stay, but which denial of a stay could avoid.

At most, its alleged entitlement to money damages could be modestly delayed—the antithesis of irreparable harm.

A stay would also conserve the parties' and judicial resources by avoiding costly litigation that could be rendered irrelevant if this Court reverses. Contrary to Plaintiff's contention that the appeal itself could be a "fruitless exercise," Opp.21, the appeal raises substantial legal questions, as explained above.

Plaintiff contends that the balance of harms tilts in its favor because it has a "right to proceed in Maryland state court." Opp.20. But whether Plaintiff has such a right is the *precise issue* raised in Defendants' appeal. And unlike the cases Plaintiff cites, there are no pending state court proceedings with which a stay would interfere. *See Maui Land & Pineapple Co. v. Occidental Chem. Corp.*, 24 F. Supp. 2d 1083 (D. Haw. 1998) (declining to recall remand where "action ha[d] already been certified to the state court"); *Browning v. Navarro*, 743 F.2d 1069, 1078-79 (5th Cir. 1984) (after remand issues to the state court, the "district judge is without power to take any further action").

CONCLUSION

The Court should stay the remand pending appeal or, alternatively, extend the stay by 14 days so Defendants may seek an emergency stay from the Supreme Court.

August 23, 2019 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 2,600 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

/s/ Theodore J. Boutrous Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 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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