

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
(Northern Division)

CITY OF ANNAPOLIS, MARYLAND,

Plaintiff,

v.

BP P.L.C., *et al.*,

Defendants.

CASE NO.: 21-cv-00772 ELH

**REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO  
STAY PROCEEDINGS**

## I. INTRODUCTION<sup>1</sup>

Plaintiff's opposition makes clear why a limited stay is appropriate. Plaintiff does not dispute that a decision by the Supreme Court is expected in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S.) ("*Baltimore*"), within the next two months. Nor does Plaintiff dispute that the Supreme Court's ruling in *Baltimore*, and any Fourth Circuit decision on remand, will clarify the question of subject-matter jurisdiction presented in Plaintiff's remand motion. Nevertheless, Plaintiff urges this Court to address its remand motion without the benefit of the Supreme Court's and potentially the Fourth Circuit's guidance, ignoring the substantial judicial and party economies that a limited stay would promote.

If the Supreme Court concludes in *Baltimore* that federal jurisdiction exists, as petitioners there have argued it should, there will be no need for the parties here to brief (and this Court to decide) the remand issues in this case. Alternatively, if the Supreme Court instructs the Fourth Circuit to consider the additional grounds for removal that it did not initially consider in that case, it will resolve a number of the jurisdictional questions at issue here. And if the Supreme Court affirms the Fourth Circuit's prior opinion, this case may proceed to briefing on Plaintiff's motion to remand without the looming possibility that a significant intervening decision will require additional, potentially duplicative briefing. A limited stay until a decision is rendered by the Supreme Court in *Baltimore* and, if appropriate, through a subsequent decision by the Fourth Circuit, will conserve judicial resources.

There is no reason for this Court to disregard its inherent authority to manage its docket, *see Landis v. North American Co.*, 299 U.S. 248, 254–55 (1936), and proceed to decide threshold

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<sup>1</sup> This motion is submitted subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, insufficient service of process, or lack of service of process.

jurisdictional issues on which the Supreme Court and Fourth Circuit are poised to issue instructive and potentially dispositive rulings in the near term. Plaintiff waited *years* to file the present lawsuit—in fact, Plaintiff waited *more than two and a half years* after the City of Baltimore filed its substantially identical lawsuit, which is now subject to review by the Supreme Court. This case is unquestionably “still in the very early stages of litigation,” and “there is little prejudice to either side if the Court stays the case.” *American Tech. Servs., Inc. v. Universal Travel Plan, Inc.*, 2005 WL 2218437, at \*3 (E.D. Va. Aug. 8, 2005). The brief stay requested is warranted and prudent, and will well serve both the parties and the Court. Accordingly, the Court should grant Defendants’ Motion to Stay (“Motion” or “Mot.”) (ECF No. 80) and enter the requested stay.

## II. ARGUMENT

### A. The Requested Stay Will Conserve Judicial Resources And Promote Judicial Economy.

Plaintiff asserts that “[j]urisdiction is a threshold inquiry” and that “[w]ithout jurisdiction the court cannot proceed in any cause.” Pltf’s Opposition (“Opp.”), Dkt. 117 at 1 (quoting *Exparte McCardle*, 74 U.S. 506, 514 (1869)). Accordingly, Plaintiff recognizes, as it must, the “importan[ce]” of “mak[ing] correct decisions about federal jurisdiction.” *Id.* at 13 (quoting 15A Wright & Miller, Fed. Prac. & P. § 3914.11 (2d ed.)). And notably, Plaintiff concedes that a number of Defendants’ grounds for removal were “*not previously resolved by the Fourth Circuit.*” *Id.* at 8 (emphasis added). Yet remarkably, Plaintiff asks this Court to move forward on Plaintiff’s motion to remand immediately, ignoring that the Supreme Court and potentially the Fourth Circuit may soon determine the propriety of several of those unresolved removal grounds, which would enable this Court to be certain it is making the “correct” decision about its jurisdiction. Because of the importance of these threshold decisions, it is reasonable and prudent for this Court to stay proceedings until the Supreme Court, and possibly the Fourth Circuit, can provide guidance on the

subject-matter jurisdiction questions in this case. As the Supreme Court has made clear, although a pending action “may not settle every question of fact and law,” a stay may still be warranted where the resolution of that action may “simplify them.” *Landis*, 299 U.S. at 256. At a minimum, once the Supreme Court has issued its decision, this Court will be better able to assess the extent to which the pending appellate proceedings bear upon this case.

Rather than make a meaningful argument that a stay pending *Baltimore* will not promote judicial efficiency here, Plaintiff refers to rulings in other cases, in other procedural postures, that say nothing about the likely impact of the Supreme Court’s decision on this case. *See generally* Opp. at 15–19. The motions at issue in those cases sought to stay issuance of remand orders *in those cases* pending defendants’ appeals of those remand orders; they were not seeking to stay proceedings pending an imminent decision in a relevant Supreme Court case. Far more revealing than the decisions cited by Plaintiff is the Maryland state court’s decision in *Baltimore* itself—which is conspicuously absent from Plaintiff’s discussion—to defer further proceedings in that case pending Supreme Court review. Order Deferring Motions, *Mayor & City Council of Baltimore v. BP P.L.C.*, Case No. 24-C-18-004219 (Balt. Cir. Ct. Aug. 6, 2020) (attached hereto as “Exhibit A”). The Maryland state court deferred both a hearing on a motion for protective order and consideration of the defendants’ merits motion to dismiss pending Supreme Court proceedings in *Baltimore*. *Id.* Notably, the defendants did not affirmatively seek the latter deferral; rather, the court imposed it “upon its own initiative.” *Id.* The City of Baltimore, represented by the same counsel as Plaintiff here, filed a petition for mandamus in the Maryland Court of Appeals to overturn the state court’s order deferring proceedings, *see* Petition for Writ of Mandamus, *Mayor & City Council of Baltimore v. BP P.L.C.*, No. MISC-0005 (Md.) (filed Sept. 4, 2020), which was summarily denied, *see* Order Denying Petition for Writ of Mandamus, *Mayor & City Council of*

*Baltimore v. BP P.L.C.*, No. MISC-0005 (Md. Oct. 23, 2020). This stay not only reflects the state court’s recognition that the pending U.S. Supreme Court proceedings in *Baltimore* are relevant to the state court proceedings post-remand, but also that it is wholly within the Court’s discretion in managing its own docket to impose a stay while it awaits the issuance of a decision from the nation’s highest court on issues that are highly relevant to this case.

Other trial courts in pending climate change-related actions have also imposed stays, or are currently considering them, pending the outcome of appellate proceedings that may shed light on relevant issues.<sup>2</sup> Examples include the ongoing stay in the *State of Rhode Island* action in Rhode Island state court, *see* Order Delaying Further Proceedings, *State of Rhode Island v. Chevron Corp.*, C.A. No. PC-2018-4716, 2020 WL 4812764 (R.I. Super. Ct. Aug. 13, 2020), and in the *King County* action in the Western District of Washington, *see* Order Granting Partially Unopposed Motion to Stay Proceedings, *King County v. BP P.L.C.*, No. C18-758-RSL, Dkt. 138 (W.D. Wash. Oct. 17, 2018). Both of these stays, which Plaintiff omits from its discussion as well, are in place pending resolution of appellate proceedings that may clarify questions of law in those cases.

Plaintiff also incorrectly argues that “the Supreme Court’s decision will have no bearing on the merits of the City’s motion to remand.” *Opp.* at 4. But this assertion hinges entirely on Plaintiff’s mistaken premise that “the only question before the Supreme Court concerns the scope of appellate jurisdiction over remand orders.” *Id.* In fact, the briefing in *Baltimore* also urges the

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<sup>2</sup> Defendants in the related *Honolulu* and *Maui* actions have moved to stay state court proceedings there, which motions will be heard on May 19, 2021. *See* Motion to Stay Proceedings, *City and County of Honolulu v. Sunoco LP*, Civil No. 1CCV-20-0000360, Dkt. 129 (Haw. 1st Cir. Ct. Apr. 21, 2021); Motion to Stay Proceedings, *County of Maui v. Sunoco LP*, Civil No. 2CCV-20-0000283, Dkt. 116 (Haw. 2d. Cir. Ct. Apr. 20, 2021).

Supreme Court to “take the modest step of applying its precedents to the claims at issue [t]here and confirm that they belong in federal court” because those claims “necessarily and exclusively arise under federal law.” Brief for Petitioners at 4, *BP p.l.c. v. Mayor and City Council of Baltimore*, No. 19-1189 (U.S. Nov. 16, 2020); *see also id.* at 38–45; Pet. 20 (U.S. Mar. 31, 2020) (explaining that the Supreme Court has the discretion “to proceed to address the remaining grounds for removal and reverse the judgment below”). Plaintiff acknowledges this fact, but relegates it to a footnote. *See Opp.* at 7 n.4.

But even if the Supreme Court declines to reach the issue of whether climate change-related claims, like those asserted by Plaintiff here, “arise under federal law” and thus are properly removable on that basis, there is a substantial likelihood that the Supreme Court will hold that circuit courts of appeal have jurisdiction to review an entire remand order where federal officer removal is asserted, and will remand the *Baltimore* case to the Fourth Circuit for consideration of grounds “not previously resolved by the Fourth Circuit.”<sup>3</sup> *Opp.* at 8. Indeed, several commentators have opined that the Supreme Court will likely do just that.<sup>4</sup>

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<sup>3</sup> As explained in Defendants’ Motion, grounds not previously resolved include removal based on federal common law, *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005), the Outer Continental Shelf Lands Act (“OCSLA”), and federal enclave jurisdiction, which are all asserted by Defendants in this action as well. *See Mot.* at 3.

<sup>4</sup> *See* Christine Condon, *U.S. Supreme Court Hears Arguments in Baltimore’s Climate Change Lawsuit Against Fossil Fuel Companies*, *Baltimore Sun* (Jan. 19, 2021), <https://tinyurl.com/yyfhd47j> (“Based on the [J]ustices’ questions, [University of Maryland Law Professor Robert] Percival said it seems likely that they’ll rule that the Court of Appeals must consider all of the companies’ arguments—not just the one about federal officers.”); Lawrence Hurley, *U.S. Supreme Court Wrestles With Dispute Over Baltimore Climate Suit*, *Reuters* (Jan. 19, 2021), <https://tinyurl.com/emje9th8> (“U.S. Supreme Court [J]ustices on Tuesday appeared to lean toward energy companies in a dispute over a lawsuit filed by the city of Baltimore seeking monetary damages for the impact of global climate change.”).

The Second Circuit’s recent opinion in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. Apr. 1, 2021), bolsters the view that the Fourth Circuit may find that the claims at issue in these cases are governed by federal common law and thus belong in federal court. The *City of New York* action, like this one, sought damages in tort based on harms allegedly resulting from climate change. The Second Circuit held that “[g]lobal warming presents a uniquely international problem of national concern [and] is therefore not well-suited to the application of state law,” *id.* at 85–86, and as a result, claims seeking damages for the alleged impacts of global climate change “must be brought under federal common law,” *id.* at 95. Because the plaintiff in *City of New York* filed its complaint in federal court, that case did not present the same removal question at issue here. *See id.* at 93. But the Second Circuit’s rationale clearly supports Defendants’ arguments for removal here based on federal common law, which the Fourth Circuit will consider if the Supreme Court vacates and remands in *Baltimore*.

In short, this Court should grant a stay pending the Supreme Court’s resolution of *Baltimore* because that decision (or a decision by the Fourth Circuit on remand) may “avoid the ‘needless duplication of work and the possibility of inconsistent rulings.’” *Commonwealth of Virginia ex rel. Integra Rec LLC v. Countrywide Securities Corp.*, 2015 WL 222312, at \*4 (E.D. Va. Jan. 14, 2015) (quoting *Sehler v. Prospect Mortg., LLC*, 2013 WL 5184216, at \*2 (E.D. Va. Sept. 16, 2013)).

**B. Plaintiff Fails To Show Any Prejudice It Will Suffer As A Result Of A Stay.**

In urging this Court to proceed with potentially unnecessary briefing on its motion to remand without the benefit of the Supreme Court’s forthcoming decision or a potential Fourth Circuit decision, Plaintiff claims that “[t]ime is of the essence for Annapolis because it is acutely vulnerable to sea level rise.” *Opp.* at 11. But whether Plaintiff may be prejudiced *by the alleged effects of climate change* is not the issue before the Court. The only relevant question is whether

Plaintiff will be prejudiced *by a short stay of this litigation*. The answer to the latter question is clearly no.

The brief stay requested will not materially affect Plaintiff. Plaintiff acknowledges that it brought this action “to recover costs for . . . climate impacts,” *id.* at 5, yet fails to explain why waiting a couple of months for the Supreme Court to decide *Baltimore* will have any material effect on its ability to collect any damages it claims Defendants owe. Nor could it, given the well-recognized principle that a “[p]laintiff will not suffer undue prejudice . . . from a stay [where] it can be fully compensated if necessary with money damages.” *Univ. of Va. Patent Found. v. Hamilton Co.*, 2014 WL 4792941, at \*3 (W.D. Va. Sept. 25, 2014).

Plaintiff has not shown the urgency in prosecuting this action that it now demands of this Court in deciding its motion to remand. According to Plaintiff’s own Complaint, the harms associated with fossil-fuel combustion have been well known for more than a half century. *See, e.g.*, Compl. ¶ 68 (“By 1965, concern over the potential for fossil fuel products to cause disastrous global warming reached the highest level of the United States’ scientific community.”); *id.* ¶ 105 (noting the “overwhelming information about the threats to people and the planet posed by continued unabated use of . . . fossil fuel products” since at least the 1990s). And state and municipal plaintiffs have been filing suits nearly identical to the one here—represented by the same counsel, and often employing nearly identical complaints—since at least July 2017. *See, e.g., County of San Mateo v. Chevron Corp.*, No. 17-civ-03222 (San Mateo Super. Ct.) (filed July 17, 2017); *People v. BP p.l.c.*, No. RG17875889 (San Francisco Super. Ct.) (filed Sept. 19, 2017).

Indeed, Plaintiff did not bring its climate change-related claims for *more than two and a half years after* the City of Baltimore, represented by the same counsel, brought its own substantially similar claims, alleging similar injuries as a result of rising sea levels along the



Chesapeake Bay, less than forty miles up the coast from Plaintiff. *Mayor and City Council of Baltimore v. BP P.L.C.*, Case No. 24-C-18-004219 (Balt. Cir. Ct.) (filed July 20, 2018). Plaintiff cannot complain now about a short delay pending the Supreme Court’s important decision after waiting years to file a complaint.

**C. Defendants Face Serious Hardship In The Absence Of A Stay.**

In contrast, Defendants face serious hardship if remand briefing proceeds absent the requested stay because they will be forced to brief the question of subject matter jurisdiction under a legal framework that might be materially altered in just a few months’ time. At that point, the parties may need to either re-brief the issue or, if this Court were to remand the case, attempt to remove the action once more, potentially after further litigation in state court. *See* Mot. at 9–10.

Attempting to brush aside these concerns, Plaintiff contends that “[b]riefing a jurisdictional motion that this Court will inevitably need to resolve is not hardship—it is litigation.” Opp. at 13. But Plaintiff again misses the mark. The point is that Defendants will be prejudiced by being forced to brief Plaintiff’s remand motion while the legal landscape is shifting beneath their feet. If the Supreme Court’s decision in *Baltimore* or the Fourth Circuit’s decision on remand address the merits of removal, the parties here will be forced to start over, from scratch, in briefing Plaintiff’s remand motion or, at a minimum, submit supplemental briefing. Such a result can be avoided by entering the requested stay.

**III. CONCLUSION**

For these reasons, in addition to those set forth in Defendants’ Motion to Stay, the Court should stay further proceedings in this case until the Supreme Court issues its decision in *Baltimore* and the Fourth Circuit issues any decision on remand.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on the 5th day of May 2021, the foregoing document was filed through the CM/ECF system and thereby served upon all counsel of record.

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