UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY;
BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; and
CITY OF BOULDER,

Plaintiffs,

v.

SUNCOR ENERGY (U.S.A.) INC.;
SUNCOR ENERGY SALES INC.;
SUNCOR ENERGY INC.; and
EXXON MOBIL CORPORATION,

Defendants.

Case No. 1:18-cv-1672-WJM-SKC

DEFENDANTS' MOTION FOR A STAY OF THE REMAND ORDER PENDING APPEAL*

As this Court recognized in its order remanding this climate-change tort case to state court, "United States District Court cases throughout the country are divided on whether federal courts have jurisdiction over state-law claims related to climate change." ECF No. 69, at 3. In particular, district courts have disagreed about whether climate-change tort claims necessarily arise under federal common law, permitting removal to federal court. After the filing of the notice of appeal in this case, cases presenting the question whether federal common law governs climate-change tort claims are now pending in four federal courts of appeals.

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* Defendants submit this motion subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

The conflict of authority on that complex legal question and the state of climate-change litigation nationwide amply justify the entry of a stay of this Court's remand order pending appeal. Defendants have a statutory right to appeal the order, and the Tenth Circuit will have jurisdiction to address all of the grounds for removal that the remand order encompasses. A stay pending appeal will thus protect defendants' appellate rights while providing the Tenth Circuit with an opportunity to weigh in on issues that other federal courts of appeals are considering. The lack of a stay, by contrast, will irreparably harm defendants. At best, defendants would be subject to duplicative proceedings in federal and state court; at worst, defendants could effectively lose their right to appeal. And given the nature of plaintiffs' claims and the public interests involved, the balance of harms tilts decidedly in defendants' favor. A stay of the remand order pending appeal is therefore warranted.

ARGUMENT

Federal district courts have inherent authority to stay the enforcement of an order pending appeal. *See Nken* v. *Holder*, 556 U.S. 418, 421 (2009). Courts assess whether a stay pending appeal is warranted by considering four traditional factors: "(1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay or injunction is not granted; (3) the absence of harm to opposing parties if the stay or injunction is granted; and (4) any risk of harm to the public interest." *FTC* v. *Mainstream Marketing Services, Inc.*, 345 F.3d 850, 852 (10th Cir. 2003); *see Nken*, 556 U.S. at 434. Each of those favors supports a stay of this Court's remand order pending review by the Tenth Circuit.

A. Defendants Are Sufficiently Likely To Prevail On Appeal To Warrant A Stay Of The Remand Order

The first of the traditional stay factors is likelihood of success on the merits. In cases where the appealing party demonstrates that "the three 'harm' factors tip decidedly in its favor," it need only show that the appeal will raise issues "so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Mainstream Marketing*, 345 F.3d at 852-853.

Applying those standards here, this case easily satisfies the first stay factor. Defendants have a statutory right to appeal this Court's remand order because defendants removed the case under the federal-officer-removal statute. The court of appeals, moreover, has appellate jurisdiction to consider all of the grounds for removal that defendants asserted—including removal based on federal common law. Defendants are likely to prevail on that issue and others, or at a minimum have shown the presence of "serious, substantial, difficult, and doubtful" issues regarding the grounds on which it removed this case from state court. *Mainstream Marketing*, 345 F.3d at 852-853.

1. The Court Of Appeals Has Jurisdiction To Review This Court's Entire Remand Order

As a general matter, 28 U.S.C. § 1447(d) precludes appellate review of an order remanding a case to state court. But Section 1447(d) also contains an express exception: "[A]n order remanding a case to the State court from which it was removed pursuant to 1442 or 1443 of this title shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d). Defendants removed this case in part under 28 U.S.C. § 1442, the federal-officer-removal statute, providing the court of appeals with jurisdiction to review this Court's "order remanding [the] case" to state court. *Id.*

Plaintiffs may contend that the Tenth Circuit's jurisdiction is limited to reviewing this Court's decision regarding removal under the federal-officer-removal statute—meaning that no other ground for removal would be reviewable. But that would be incorrect, and the text of Section 1447(d) demonstrates why. "To 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). Looking "beyond the text of § 1447(d) to the reasons that led to its enactment" leads to "the same conclusion." *Id.* at 813. Section 1447(d) "was enacted to prevent appellate delay in determining where litigation will occur" when a case is removed to federal court. *Id.*; *see Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 640 (2006). "But once Congress has authorized appellate review of a remand order . . . a court of appeals has been authorized to take the time necessary to determine the right forum." *Lu Junhong*, 792 F.3d at 813. "The marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Id.*

The Supreme Court's decision in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), provides additional support. In *Yamaha*, the Court faced the question whether, in an interlocutory appeal under 28 U.S.C. § 1292(b), a court of appeals could review only the particular *question* certified by the district court, or could instead address any issue encompassed in the district court's certified *order*. The Court concluded that a court of appeals may address "any issue fairly included within the certified order," and not only the particular question certified. *Id.* at 205. The Court observed that "the text of § 1292(b) indicates" 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.*

The same reasoning applies here. Section 1447(d) authorizes appellate review of remand "order[s]" in cases removed under the federal-officer-removal statute. 28 U.S.C. § 1447(d). The court of appeals can thus address "any issue fairly included within the certified order." *Yamaha Motor Corp.*, 516 U.S. at 205. Lest any doubt remain, Congress first authorized appellate review of cases removed under the federal-officer-removal statute in 2011—after the decision in *Yamaha*. Congress of course is presumed to be aware of judicial interpretations of relevant statutory text. *See Cannon* v. *University of Chicago*, 441 U.S. 677, 697-698 (1979); *Consolidation Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 864 F.3d 1142, 1148 (10th Cir. 2017). Thus, as the leading treatise on federal jurisdiction suggests, appellate review of a remand order under Section 1447(d) "should . . . be extended to all possible grounds for removal underlying the order." 15A Charles A. Wright et al., *Federal Practice & Procedure* § 3914.11 (2d ed. West 2019).

To be sure, the question of the scope of appellate review under Section 1447(d) is the subject of a conflict among the federal courts of appeals. Two courts of appeals have held that they may review the district court's entire remand order under Section 1447(d). *Lu Junhong*, 792 F.3d at 813; *Mays* v. *City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017). Five courts of appeals have held that appellate review is limited to the specific ground for removal that triggered the exception in Section 1447(d), although only three of those courts have so held since the Supreme Court's decision in *Yamaha*. *See Jacks* v. *Meridian Resource Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012); *Alabama* v. *Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *Davis* v. *Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *State Farm Mutual Automobile Insurance Co.* v. *Baasch*, 644 F.2d 94, 96 (2d Cir. 1981) (per curiam); *Noel* v. *McCain*, 538 F.2d 633, 635 (4th Cir. 1976). Another circuit has

authority going both ways. *Compare Decatur Hospital Authority* v. *Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017), *with City of Walker* v. *Louisiana ex rel. Department of Transportation & Development,* 877 F.3d 563, 566 (5th Cir. 2017).

The Tenth Circuit has never squarely addressed the issue of the scope of appellate review in appeals authorized by Section 1447(d). But its decision in *Coffey* v. *Freeport McMoran Copper & Gold*, 581 F.3d 1240 (2009), strongly suggests that it would review the district court's entire order, not simply the ground that permitted appeal. In *Coffey*, the Tenth Circuit addressed an appeal under the removal provisions of the Class Action Fairness Act (CAFA). CAFA provides that, "notwithstanding [S]ection 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action." 28 U.S.C. § 1453(c)(1). Because that language did not limit the court of appeals to review of the removal grounds under CAFA, the court concluded that it could review the alternative grounds for removal asserted by the defendant and addressed in the district court's order. *Coffey*, 581 F.3d at 1247; *accord Parson* v. *Johnson & Johnson*, 749 F.3d 879, 893 (10th Cir. 2014). The same conclusion follows here, where the relevant statutory text also does not limit the scope of appellate review and indeed affirmatively authorizes review of the entire "order" appealed. *See* 28 U.S.C. § 1447(d).

For the foregoing reasons, the Tenth Circuit is likely to review this Court's entire remand order on appeal. This Court should therefore consider the merits of all of defendants' grounds of removal when assessing likelihood of success on the merits under the first stay factor. And the presence of a conflict of authority on the scope of appellate review under Section 1447(d) itself supports a stay. *See Community Television of Utah, LLC* v. *Aereo, Inc.*, 997 F. Supp. 2d 1191,

1210 (D. Utah 2014); *In re Cintas Corp. Overtime Pay Arbitration Litigation*, Civ. No. 06-1781, 2007 WL 1302496, at *2-3 (N.D. Cal. May 2, 2007).

2. *The Merits of Defendants' Removal Arguments Satisfy The First Stay Factor*

This case raises complex and novel questions regarding federal jurisdiction that have already divided multiple district courts and warrant further review by the Tenth Circuit.

a. As this Court observed in its remand order, "United States District Court cases throughout the country are divided on whether federal courts have jurisdiction over state law claims related to climate change, such as raised in this case." ECF No. 69, at 3. In particular, two district courts (in three cases) have ruled that tort claims related to global climate change necessarily arise under federal common law. *See California* v. *BP p.l.c.*, Civ. Nos. 17-6011 & 17-6012, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018); *City of Oakland* v. *BP p.l.c.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018); *City of New York* v. *BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018). While disagreeing with those rulings, this Court recognized that one of the decisions in particular "has a certain logic." ECF No. 69, at 14 (discussing *California*, *supra*). Four district courts have ruled that federal jurisdiction does not exist over climate-change tort claims, but have done so based on differing rationales. This Court and two others have ruled that the well-pleaded-complaint rule forbids removal based on defendants' argument that climate-change tort claims necessarily arise under federal common law. *See* ECF No. 69, at 16-19; *Mayor & City Council of Baltimore* v. *BP p.l.c.*, 388 F. Supp. 3d 538, 554-558 (D. Md. 2019); *Rhode Island* v. *Chevron Corp.*, Civ. No. 18-395, 2019 WL 3282007, at *2 (D.R.I. July 22, 2019). The fourth court, however, ruled that plaintiffs' claims could not arise under federal common law because the Clean Air Act displaced any federal common law that would otherwise exist. *See County of San Mateo* v. *Chevron Corp.*,

294 F. Supp. 3d 934, 937 (N.D. Cal. 2018). As this Court recognized, there are "no dispositive cases" on the issue from the Supreme Court or the Tenth Circuit. ECF No. 69, at 3. The lack of binding authority and the conflicting district-court decisions—each currently on appeal to the First, Second, Fourth, Ninth, and now Tenth Circuits—confirm that defendants' appeal presents serious legal questions worthy of further appellate review.

b. Defendants' appeal also presents the substantial question whether the federal-officer-removal statute provides jurisdiction over this action. As defendants have previously explained, ECF No. 48, at 32-35, they extracted, produced, and sold fossil fuels at the direction of federal officers. *See* ECF No. 69, at 42-48. That more than satisfies the requirements for removal.

This Court concluded that "[d]efendants have not shown that they acted under the direction of a federal officer, or that there is a causal connection between the work performed under the leases and [p]laintiffs' claims." ECF No. 69, at 45. That may be true with respect to *some* of defendants' conduct that plaintiffs alleged caused them injury. But not *all* of the relevant activities need take place under the control of federal officers to permit removal under the federal-officer-removal statue. *See, e.g.*, *Reed* v. *Fina Oil & Chemical Co*., 995 F. Supp. 705, 712 (E.D. Tex. 1998); *Lalonde* v. *Delta Field Erection*, Civ. No. 96-3244, 1998 WL 34301466, at *4-6 (M.D. La. Aug. 6, 1998).

c. Defendants additionally raise a legitimate dispute as to whether plaintiffs' claims necessarily present a federal issue by, among other things, calling into question the balance struck by the federal government between environmental and energy-related concerns. *See Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308, 312-313 (2005); ECF No. 48, at 21-27. Resolution of plaintiffs' claims necessarily requires courts to determine

whether federal agencies implementing various environmental statutes struck the proper balance between promoting energy production and energy security while ensuring compliance with existing environmental statutes. *See* ECF No. 48, at 21-29.

For all of the foregoing reasons, and for the additional reasons asserted at greater length in defendants' opposition to plaintiffs' motion to remand, ECF No. 48, at 29-40, defendants are likely to prevail on appeal. At a minimum, the appeal presents "serious, substantial, difficult, and doubtful" questions that the Tenth Circuit should have an opportunity for review. *Mainstream Marketing*, 345 F.3d at 852-853. The first stay factor is therefore satisfied.

B. Defendants Will Suffer Irreparable Harm Absent A Stay

The second stay factor is whether defendants will likely suffer "irreparable harm" in the absence of a stay. *Mainstream Marketing*, 345 F.3d at 852. The answer here is yes. Once the clerk mails the certified copy of the remand order to the state court, this case will likely proceed there while defendants' appeal is pending. *See* 28 U.S.C. § 1447(c). Defendants would then simultaneously have to brief and argue federal jurisdictional issues in the Tenth Circuit while litigating plaintiffs' claims in Colorado state court. That would be unnecessarily burdensome for defendants and the courts involved alike. *See Lafalier* v. *Cinnabar Service Co*., Civ. No. 10-5, 2010 WL 1816377, at *2 (N.D. Okla. Apr. 30, 2010). Especially so if discovery occurs in state court and defendants prevail on appeal: "[t]he cost of proceeding with discovery [in state court]—and potentially relitigating discovery issues in federal court—is likely to be high," and "such costs are irreparable." *See Citibank, N.A.* v. *Jackson*, Civ. No. 16-712, 2017 WL 4511348, at *2 (W.D.N.C. Oct. 10, 2017). Interim state court rulings on substantive issues would also create "significant issues of comity" that the parties and the court would have to address if the case returned to federal

court. *Bryan* v. *BellSouth Communications, Inc.*, 492 F.3d 231, 241 (4th Cir. 2007); *see, e.g.*, *Anderson* v. *Wilco Life Insurance Co.*, Civ. No. 19-8, 2019 WL 3225837, at *2 (S.D. Ga. July 17, 2019); *Northrop Grumman Technical Services, Inc.* v. *DynCorp International LLC*, Civ. No. 16-534, 2016 WL 3346349, at *3-4 (E.D. Va. June 16, 2016).

The need to avoid unnecessary state-court proceedings is particularly salient in cases removed under the federal-officer-removal statute. The federal courts' "unusual ability to review a remand order" in that class of cases "reflects the importance Congress placed on providing federal jurisdiction for claims asserted against federal officers and parties acting pursuant to the orders of a federal officer." *See Decatur*, 854 F.3d at 295-296. Accordingly, a stay is necessary "to prevent rendering the statutory right to appeal 'hollow.' " *Northrop Grumman*, 2016 WL 3346349, at *3; *Laborers & Hod Carriers Pension Fund* v. *Renal Care Group, Inc.*, Civ. No. 05-451, 2005 WL 2237598, at *1 (M.D. Tenn. Sept. 12, 2005) (similar); *Vision Bank* v. *Bama Bayou, LLC*, Civ. No. 11-568, 2012 WL 1592985, at *2 (S.D. Ala. May 7, 2012) (similar).

Indeed, if defendants prevail on appeal in the absence of a stay, it is not entirely clear "how, procedurally, [this case] would make [its] way from state court back to federal court and whether [its] doing so would offend either the Anti-[I]njunction Act, 28 U.S.C. § 2283, or the notions of comity underpinning it." *Barlow* v. *Colgate Palmolive Co.*, 772 F.3d 1001, 1014 n.2 (4th Cir. 2014) (Wynn, J., concurring in part and dissenting in part). The Tenth Circuit has held that, once a remand order becomes final and is dispatched to the state court, a federal court cannot enjoin the state proceedings. *See Chandler* v. *O'Bryan*, 445 F.2d 1045, 1057-1058 (10th Cir. 1971); *see also, e.g.*, *FDIC* v. *Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979). This case of course involves

different circumstances—namely, that defendants have a statutory right to appeal the remand order. But if the Tenth Circuit rejected that ground for distinction, the absence of a stay could potentially "destroy appellants' rights to secure meaningful review." *Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979). That strongly counsels in favor of a stay. *See id.*

C. The Balance Of Harms Favors Defendants

Where, as here, governmental entities are the parties opposing the entry of a stay pending appeal, the third and fourth stay factors—harm to the opposing party and the public interest—"merge" and are considered together. *See Nken*, 556 U.S. at 435. Considering those factors together, a stay will not significantly harm plaintiffs. To begin with, "a stay w[ill] not permanently deprive [plaintiffs] of access to state court." *Northrop Grumman*, 2016 WL 3346349, at *4. "The only potential injury faced by [plaintiffs] is delay in vindication of its claim," which does not counsel against the entry of a stay. *Weingarten Realty Investors* v. *Miller*, 661 F.3d 904, 913 (5th Cir. 2011). Plaintiffs' own complaint in fact demonstrates the lack of harm from any delay pending appeal. A substantial portion of the damages that plaintiffs seek stems from purported costs that it has not yet incurred and may not incur for decades. *See, e.g.*, ECF No. 7, ¶¶ 3, 147, 149. Nor will any delay impair plaintiffs' request for equitable relief to "abate[] harms" that they claim are "to some degree [] irreversible." *Id.* ¶¶ 135, 532, 534. Plaintiffs "would actually be served by granting a stay," because they would not "incur additional expenses from simultaneous litigation before a definitive ruling on appeal is issued." *Raskas* v. *Johnson & Johnson*, Civ. Nos. 12-2174 et al., 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013).

The public will benefit from a stay as well. First, given the repercussions that this lawsuit could have on federal economic, environmental, and energy policy, there is a public interest in

settling the questions of what law governs and where this case should be litigated before the state court begins to consider whether to hold the oil-and-gas industry responsible for alleged harm caused by climate change. A stay pending appeal would also "conserv[e] judicial resources and promot[e] judicial economy" by "avoid[ing] potentially duplicative litigation in the state courts and federal courts." *Raskas*, 2013 WL 1818133, at *2; *see United States* v. *2366 San Pablo Ave.*, Civ. No. 13-2027, 2015 WL 525711, at *5 (N.D. Cal. Feb. 6, 2015).

* * * * *

A stay of this Court's remand order pending appeal is amply warranted. Defendants have a statutory right to appeal the order, and the court of appeals will have jurisdiction to consider all of the grounds for removal addressed in that order. Those grounds include the argument that plaintiffs' claims necessarily arise under federal common law—an issue that this Court recognized has divided federal courts across the country. Absent a stay pending appeal, defendants' appellate rights could be hampered or effectively eliminated, and plaintiffs will suffer little harm from any delay. All of the traditional stay factors are therefore satisfied, and a stay pending appeal should issue.

CONCLUSION

Defendants' motion for a stay of the remand order pending appeal should be granted. In the alternative, the Court should enter an additional temporary stay of the remand order to allow defendants to apply to the Tenth Circuit for a stay pending appeal and the Tenth Circuit to rule on that application. If this motion is denied, defendants plan to file a stay motion with the Tenth Circuit within 14 days of the Court's ruling on this motion.

Respectfully submitted,

September 13, 2019

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CERTIFICATE OF EFFORTS TO CONFER

Pursuant to Local Rule 7.1(a), I, Kannon K. Shanmugam, certify that, on September 12 and 13, 2019, counsel for defendants contacted counsel for plaintiffs in an attempt to confer regarding the filing of this motion. Counsel for defendants could not reach counsel for plaintiffs.

/s/ Kannon K. Shanmugam
Kannon K. Shanmugam

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, certify that on September 13, 2019, the foregoing document was filed through the Court's CM/ECF system and was therefore served on all registered participants identified on the Notice of Electronic Filing.

/s/ Kannon K. Shanmugam
Kannon K. Shanmugam