UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 19-1818

STATE OF RHODE ISLAND

Plaintiff-Appellee,

v.

SHELL OIL PRODUCTS COMPANY, LLC; CHEVRON CORP.; CHEVRON USA, INC.; EXXON MOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL PLC; MOTIVA ENTERPRISES, LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM COMPANY, LP; SPEEDWAY, LLC; HESS CORP.; LUKOIL PAN AMERICAS LLC; GETTY PETROLEUM MARKETING, INC.,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Rhode Island, No. 1:18-cv-00395-WES-LDA
(The Honorable William Edgar Smith)

DEFENDANTS' REPLY IN SUPPORT OF THEIR EXPEDITED MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION[1]

Defendants' appeal presents complex issues of federal jurisdiction that have divided district courts across the country and are now under review by the Second, Fourth, Ninth, and Tenth Circuits—a clear illustration that this appeal involves "serious and difficult questions of law in an area where the law is somewhat unclear." Plaintiff's contention that most jurisdictional issues addressed in the Remand Order (Ex.D) are unreviewable on appeal contradicts the plain text of 28 U.S.C. §1447(d), the Supreme Court's interpretation of almost identical statutory language, decisions of the Sixth and Seventh Circuits, and the leading treatise on federal jurisdiction. It also has no support in First Circuit precedent. The entire Remand Order is reviewable on appeal.

The merits of this appeal are self-evident. Plaintiff seeks relief for alleged injuries resulting from Defendants' worldwide fossil-fuel production and the global greenhouse gas emissions of countless actors, including Rhode Island and its residents. Defendants' lawful commercial activity plays a key role in virtually every sector of the global economy—supplying fuels that power most forms of transportation, heat countless homes, literally keep the lights on, and enable

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

production and innovation across all industries. Yet Plaintiff seeks a ruling deeming Defendants' conduct a public nuisance. In short, Plaintiff seeks to use *state* tort law to regulate Defendants' *worldwide* fossil-fuel production because of *worldwide* greenhouse gas emissions.

As two district courts have recognized, this is "exactly the type of 'transboundary pollution suit[]' to which federal common law should apply." *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018) (citing *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012)). In *California v. BP p.l.c.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*BP*"), the district court held that the plaintiffs' claims were "necessarily governed by federal common law." *Id.* at *2. "Taking the complaints at face value," the court held that "the scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law." *Id.* at *3. The disparate tort law of 50 states—unreconciled by any reviewing body—cannot provide the decisional law for claims arising from the lawful worldwide production and consumption of fossil fuels under hundreds of countries' regulatory authority.

Plaintiff's irreparable harm arguments are unavailing. Without a stay, the state court may reach final judgment before Defendants' appeal is resolved. That prospect increases if the Supreme Court grants certiorari to resolve the scope of appellate

review under §1447(d). A stay would prevent the parties from unnecessarily litigating various motions premised on state substantive or procedural law in state court, then re-litigating them under federal law in federal court if Defendants prevail on appeal. And although Plaintiff contends discovery would proceed immediately regardless of the court, the District of Rhode Island typically does not begin discovery until after dispositive Rule 12 motions are resolved.

Finally, Plaintiff identifies no harm that would result from a stay. 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 Meet the Standard for a Stay

Plaintiff argues that Defendants must make "a *strong showing*" that they will prevail on appeal. Pl.'s Opp. to Stay Mot. 5. But this prong is satisfied where an appeal presents "serious and difficult questions of law in an area where the law is somewhat unclear" or an issue that is "neither elementary nor well-established." *Bos. Taxi Owners Ass'n, Inc. v. City of Boston*, 187 F. Supp. 3d 339, 341–42 (D. Mass. 2016) (citing *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 150 (D. Mass. 1998)). That standard is satisfied here.

A. The Entire Remand Order Is Reviewable On Appeal

Plaintiff argues that this Court has jurisdiction to review only federal officer removal. Opp.6–12. But 28 U.S.C. §1447(d) unambiguously authorizes review of a remand "order" in cases removed under §1442. 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.) (citation omitted); *accord Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017).

Plaintiff contends that Judge Easterbrook misread *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996) (Opp.10), 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." *Id.* at 205. But *Lu Junhong*'s "application of *Yamaha* ... to the word 'order' in §1447(d) ... [was] entirely textual." 792 F.3d at 812. *Yamaha* clarified that when a statute authorizes appellate review of an otherwise unreviewable district court order, the "appellate court may address any issue fairly included" in that "order." 516 U.S. at 205. The Seventh Circuit thus properly concluded 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 therein. *Lu Junhong*, 792 F.3d at 811.

Plaintiff asserts that *Yamaha*'s reasoning should not extend to §1447(d) because "Congress identified only two specific and tightly-constrained grounds for appellate review of remand issues." Opp.9. But §1447(d) "was enacted to prevent appellate delay in determining where litigation will occur," not to immunize district court decisions from appellate review. *Lu Junhong*, 792 F.3d at 813. "[O]nce 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.*; *accord* 15A Charles Alan Wright et al., *Federal Practice & Procedure* §3914.11 (2d ed. 2014).

Plaintiff complains that the Seventh Circuit's interpretation of §1447(d) allows "an appeal *as of right* whenever a removing defendant asserts federal officer jurisdiction." Opp.9. But this consequence flows from the statute's plain text; any policy disagreement should be directed to Congress. When "statutory language is plain," courts "must enforce it according to its terms." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). Moreover, "sufficient sanctions are available to deter frivolous removal arguments[.]" Wright et al., *supra*, §3914.11; *accord Lu Junhong*, 792 F.3d at 813.

Plaintiff also asserts that the "majority of circuits" favors its interpretation. Opp.2, 10. That "majority rule," however, has been abrogated by the amendment to the removal statute. All but one of Plaintiff's cases predated the Removal Clarification Act of 2011, which authorized appellate review of cases removed under the federal officer removal statute while retaining the "order" language the Supreme Court interpreted in *Yamaha*. *See* Defs.' Stay Mot. 8–9. And *Jacks v. Meridian Resource Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012)—the only published decision supporting Plaintiff's position that postdates the Act—cited "nothing" to support its statutory interpretation and did not address *Yamaha*. *Lu Junhong*, 792 F.3d at 812; *see also* Mot.8–9. Two other published court of appeals decisions postdating the Act (*Lu Junhong* and *Mays*) adopt Defendants' interpretation.

The three unpublished, out-of-circuit per curiam opinions Plaintiff cites for the proposition that "multiple courts of appeal have rejected the interpretation Defendants advocate, as recently as this year" (Opp.11) are unpersuasive because they contain no reasoning on the scope-of-review issue and rely on cases predating the Removal Clarification Act. At most, they illustrate a lack of clarity on this issue.

Regardless of whether this Court ultimately accepts Defendants' interpretation of §1447(d), this circuit split alone satisfies the "serious and difficult questions" prong. Mot.9 (citing *Canterbury Liquors*, 999 F. Supp. at 150); *United States v. Wilkinson*, 626 F. Supp. 2d 184, 195 (D. Mass. 2009)).

B. Defendants' Appeal Presents Serious Legal Questions Regarding Whether Plaintiff's Claims Necessarily Arise Under Federal Common Law

Defendants' removal based on federal common law presents "serious legal questions." *Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979). Two district courts have concluded that global warming claims based on out-of-state emissions necessarily arise under federal common law. *See BP*, 2018 WL 1064293, at *2; *City of New York*, 325 F. Supp. 3d at 471. Plaintiff ignores *City of New York*.[2] And although the court granted remand in *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018), it relied on different reasoning than Judge Smith's order here, concluding that federal common law did not govern the plaintiffs' claims because the Clean Air Act displaced any federal common law remedy. The *San Mateo* court stayed its remand order and sua sponte certified the issues for interlocutory appeal because the case involved

[2] Plaintiff also ignores that another district court, although it rejected defendants' federal common law argument, recognized that the removal ground "presents a complex and unsettled legal question, as evidenced by the diverging opinions reached by other district courts that have considered this issue." *Mayor & City Council of Balt. v. BP P.L.C.*, No. 18-cv-2357 (D. Md. July 31, 2019), ECF No. 192 at 5. *See* Mot.12–13 & n.5.

"controlling questions of law as to which there is substantial ground for difference of opinion." *San Mateo*, No. 3:17-cv-04929 (N.D. Cal. Apr. 9, 2018), ECF No. 240.

Plaintiff contends "there can be no federal question jurisdiction over a complaint that on its face alleges exclusively state law claims" (Opp.15–16), but the cited cases did not address removal under federal common law. Nor has this Court squarely addressed the question whether a claim arises under federal law for purposes of removal when federal common law necessarily governs the claim.

Because two district courts have held that almost identical claims necessarily arose under federal common law, and because even courts reaching contrary conclusions recognized that reasonable minds could disagree on the issue, Defendants have shown that their appeal raises serious legal questions.

C. Defendants Have Raised a Serious Legal 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 on the ground that there was "[n]o causal connection" between Plaintiff's claims and actions Defendants took while "acting under" federal officers because Defendants' "alleged promotion and sale of fossil fuels abetted by a sophisticated misinformation campaign" were not "justified by [their] federal duty." Ex.D at 15. But Plaintiff does not dispute that several of its claims are based solely on Defendants' *production*

of fossil fuels, a significant portion of which occurred at the direction of federal officers. *See* Mot.14–16.

Plaintiff also complains that Defendants have rehashed arguments the district court rejected. Opp.12–13. To show a likelihood of success, however, Defendants need not present new arguments or previously uncited materials. *See Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 2010 WL 11565166, at *3 (S.D.W. Va. May 4, 2010). Nor do Defendants need to convince this Court that it will ultimately reverse the district court's Remand Order—the likelihood-of-success analysis "closely resembles the frivolousness analysis." *Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 95 (1st Cir. 2003). Defendants' appeal raises the serious legal question of whether there is a "connection or association between the act in question"—fossil-fuel production—"and the federal office"; that suffices for a stay pending appeal. *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017) (citation omitted); *accord Rivera-Santos v. Sec'y of U.S Dep't of Veterans Affairs*, 2017 WL 3498655, at *1 (D.P.R. Aug. 15, 2017).

D. Defendants Have Raised Serious Legal Questions as to Whether This Case Was Properly Removed on Other Bases

Defendants' appeal also presents serious legal questions regarding whether Plaintiff's claims were properly removed under *Grable*, OCSLA, and several other removal statutes and doctrines. Mot.17–18. Plaintiff argues that a stay is improper because the district court already "considered and rejected" Defendants' arguments

on those removal grounds. Opp.15–17. But Defendants need not demonstrate that the district court overlooked an issue to obtain a stay, as discussed above.

II. Defendants Will Be Irreparably Harmed Absent a Stay

Absent a stay, the state court could reach final judgment before Defendants' appeal is resolved—particularly if the Supreme Court grants review to resolve the circuit split on the proper interpretation of §1447(d) (and potentially a subsequent petition to decide whether Plaintiff's claims arise under federal common law). Plaintiff does not dispute that a final state-court judgment would make the Remand Order effectively "irrevocable." *Providence Journal*, 595 F.2d at 890. Moreover, the question on appeal is whether Defendants should be forced to litigate *at all* in state court under state law, and thus denying a stay and allowing the case to proceed would make the appellate right "an empty one." *Northrop Grumman Tech. Servs, Inc. v. DynCorp. Int'l, LLC*, 2016 WL 3346349, at *3 (E.D. Va. June 16, 2016); *see also* H.R. Rep. No. 112-17(I), pt. 1, at 3 (2011) (Removal Clarification Act designed to prevent federal officers from being forced to litigate in state courts).

Plaintiff contends that proceedings "would presumably pick up where they left off in state court" if Defendants' appeal succeeds. Opp.19. But a threshold issue on appeal is *which law* governs Plaintiff's claims. Dispositive motions briefed in state court under state law would need to be re-briefed in district court under federal law if this Court reverses.

Plaintiff also erroneously assumes discovery will begin before dispositive motions are resolved regardless of where the case proceeds. Opp.19–20. But discovery in the district court is generally deferred until after dispositive motions are decided. *See* D.R.I. L.R. 26(a). The prudent course is to decide which substantive law governs (and thus which court has jurisdiction) *before* briefing, motions, and discovery proceed using procedural law and rules that may not apply.

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 cannot point to harm reasonably likely to occur from a stay. At most, its alleged entitlement to damages could be modestly delayed—the antithesis of *irreparable* harm.

Plaintiff contends that the balance of harms tilts in its favor because it has a "right … to proceed in Rhode Island state court." Opp.20. Whether Plaintiff has that right is the precise issue raised in Defendants' appeal. Unlike Plaintiff's cited cases, there are no pending state court proceedings with which a stay would interfere. *See* Opp.20–21. A stay would simply preserve the status quo, while this Court determines which law applies and in which forum the action should be heard.

CONCLUSION

Defendants request that the Court extend the stay of the Remand Order pending resolution of their appeal, and that the Court do so by October 9, 2019, before the district court's stay expires. Alternatively, the Court should extend the stay by 14 days to allow Defendants to seek an emergency stay from the Supreme Court.

Dated: September 26, 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 2564 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 the foregoing document was filed through the ECF system on the 26th day of September, 2019, and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

/s/ John A. Tarantino
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