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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII**

CITY AND COUNTY OF  
HONOLULU

Plaintiff,

v.

SUNOCO LP, et al.,

Defendants.

CASE NO. 20-CV-00163-DKW-RT

**BRIEF REGARDING PENDING  
APPEALS AND PROPRIETY OF  
STAY (ECF # 24)**

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PROPRIETY OF STAY (ECF # 24)**

Plaintiff City and County of Honolulu (“City”) submits this brief concerning relevant appeals pending in the federal system in response to the Court’s April 20, 2020 Order (ECF # 24) and the three questions posed therein.<sup>1</sup> The City conferred with Defendants seeking to submit a brief jointly, which Defendants declined.

The City is aware of pending appeals in the First, Second, Ninth, and Tenth Circuits, and one petition for certiorari pending in the United States Supreme Court, that are potentially relevant to issues that will likely arise in this case either before this Court or in state court on remand. Each of the appeals discussed below arises from a case in which a state government or subdivision has sued fossil-fuel industry defendants under state law for alleged injuries from the climate crisis, to which the defendants allegedly contributed.

Two sets of appeals pending in the Ninth Circuit, docketed at *City of Oakland v. BP P.L.C.*, No. 18-16663 (9th Cir.), and *County of San Mateo v. Chevron Corp. et al.*, No. 18-15499 (9th Cir.), will likely control or at minimum strongly inform this Court’s determination of the City’s anticipated motion to remand to state court, and the arguments the parties will make in support of and opposition to that motion. A stay pending resolution of those appeals is warranted.

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<sup>1</sup> To aid the Court and for ease of reference, the City attaches Exhibit A, a table summarizing the pending relevant appeals described in this brief.

A stay is not warranted, however, during the pendency of the out-of-circuit appeals or the petition for certiorari. Decisions in those cases will not control any issue before this Court.

***Ninth Circuit.*** Two relevant sets of appeals are pending in the Ninth Circuit, which have been coordinated for consideration before the same panel. The cases are fully briefed, and the court heard oral argument on February 5, 2020.

In *County of San Mateo v. Chevron Corp. et al.*, No. 18-15499 (9th Cir.),<sup>2</sup> the defendants appealed from orders of the Northern District of California, Chhabria, J., granting the plaintiffs' motions to remand to state court. The issues presented in those consolidated appeals are (1) whether the court's appellate jurisdiction under 28 U.S.C. § 1447(d) permits review of all issues decided in the remand order or only review of the district court's finding that removal was improper under the federal office removal statute, 28 U.S.C. § 1442, and (2) whether the district court correctly granted the plaintiffs' motions to remand.

The issues on appeal in *San Mateo* substantially overlap with issues that will arise here with respect to removal jurisdiction. The defendants in *San Mateo* raised the same eight grounds for removal jurisdiction argued by Defendants here in their Notice of Removal, all of which were briefed to the district and circuit courts. The

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<sup>2</sup> Consolidated with *City of Imperial Beach v. Chevron Corp. et al.*, No. 18-15502 (9th Cir.); *County of Marin v. Chevron Corp. et al.*, No. 18-15503 (9th Cir.); and *County of Santa Cruz, et al. v. Chevron Corp. et al.*, No. 18-16376 (9th Cir.) (collectively "*San Mateo*").

*San Mateo* district court rejected each of those arguments and granted remand. *See generally City of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018). The Ninth Circuit’s ruling will strongly inform, and likely control, numerous issues that will arise in the City’s anticipated motion to remand.

In *City of Oakland v. BP P.L.C.*, No. 18-16663 (9th Cir.) (“*Oakland*”), the City of Oakland and the City and County of San Francisco appealed from orders of the Northern District of California, Alsup, J., (1) denying the cities’ motion to remand, (2) granting motions to dismiss for failure to state a claim, and (3) granting some defendants’ motions to dismiss for lack of personal jurisdiction.<sup>3</sup>

The questions presented in *Oakland* are whether the district court correctly denied remand because the plaintiffs’ claims, although pleaded under California law, “arise under” federal common law; whether the district court, having held that the plaintiffs’ causes of action arose under federal common law, correctly held that the plaintiffs failed to state a claim because their causes of action would violate separation of powers and foreign policy doctrines; and whether the district court correctly held that it lacked personal jurisdiction over four non-resident defendants.

The issues in *Oakland* substantially overlap with issues that will be raised here, at least with respect to removal jurisdiction. The defendants in *Oakland*

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<sup>3</sup> *See California v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) (remand); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (failure to state a claim); *City of Oakland v. BP p.l.c.*, No. C 17-06011 WHA, 2018 WL 3609055 (N.D. Cal. July 27, 2018) (personal jurisdiction).

raised the same eight grounds for removal presented here and in *San Mateo*. Defendants expressly rely on the *Oakland* district court opinion denying remand in their Notice of Removal, arguing that the City has alleged “nearly identical” claims here that “arise under federal common law.” Not. of Rem. ¶¶ 17–18 (Dkt. 1, Apr. 15, 2020). The Ninth Circuit’s ruling in *Oakland* will inform, and may directly control, multiple issues that will arise in the City’s anticipated motion to remand to state court, and issues that will likely arise in Defendants’ motions to dismiss.

It is appropriate for this Court to stay proceedings on the City’s anticipated motion to remand to state court until the Ninth Circuit has decided the *Oakland* and *San Mateo* appeals. The City will defer to the Court to determine procedures and timing of filings after any such stay is lifted.

**First Circuit.** One relevant appeal is pending in the First Circuit. It has been fully briefed but is not yet scheduled for oral argument. The defendants in *State of Rhode Island v. Shell Oil Products Co., LLC, et al.*, No. 19-1818 (1st Cir.) (“*Rhode Island*”), appealed from an order of the District of Rhode Island, Smith, C.J., granting the State of Rhode Island’s motion to remand its case to state court. The defendants in *Rhode Island* raised the same eight bases for federal removal jurisdiction Defendants’ asserted in their Notice of Removal here, and in both *Oakland* and *San Mateo*. The district court analyzed and rejected each of them in granting remand. *See generally Rhode Island v. Chevron Corp.*,

393 F. Supp. 3d 142 (D.R.I. 2019). The questions presented on appeal from the remand order are substantially similar to those in *San Mateo*.

The First Circuit, and Justice Breyer as Circuit Justice, both denied motions by the defendants to stay proceedings in Rhode Island state court pending appeal from the remand order.<sup>4</sup> The case has been remanded to Rhode Island Superior Court, where merits and discovery motion practice is underway.

A stay is not warranted pending resolution of the appeal in *Rhode Island*, which involves Rhode Island law and will not bind this Court.

***Second Circuit.*** There is one appeal pending in the Second Circuit that may be relevant to this Court’s determination of Defendants’ motion(s) to dismiss, if the Court denies the City’s anticipated motion to remand and retains jurisdiction.

New York City, the plaintiff in *City of New York v. BP p.l.c.*, No. 18-2188 (2d Cir.), appealed from an order of the Southern District of New York, Keenan, J., dismissing the City’s complaint for failure to state a claim. *See generally City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018). The court held that New York City’s claims, although pleaded under New York nuisance and trespass law, nonetheless “ar[o]se under federal common law.” *Id.* at 472. The court then held that the claims were displaced by the Clean Air Act, 42 U.S.C. § 7401 *et seq.*,

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<sup>4</sup> *See Rhode Island*, No. 19-1818, Doc. 117499123 (1st Cir., Oct. 7, 2019) (denying motion for stay); *BP p.l.c., et al. v. Rhode Island*, No. 19A391 (U.S. Oct. 22, 2019) (text order) (same).

and were preempted by separation of powers doctrines and the federal government's foreign affairs powers. *See id.* at 472–476. The appeal is fully briefed and was argued on November 22, 2019.

The issues presented on appeal in *City of New York* may overlap with issues to be decided here, only if the Court denies the City's anticipated motion to remand. The *City of New York* complaint was filed in the Southern District of New York in the first instance under that court's diversity jurisdiction, and no issues of removal jurisdiction are presented in the appeal. A stay pending resolution of the *City of New York* appeal is not warranted.

***Tenth Circuit.*** There is one relevant appeal pending in the Tenth Circuit. In *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir.) ("*Boulder*"), the defendants appealed from an order of the District of Colorado, Martinez, J., granting the plaintiffs' motion to remand to state court. The defendants raised seven bases for removal jurisdiction, asserting the same theories for jurisdiction as Defendants' Notice of Removal here, except admiralty, all of which the district court rejected. *See generally Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019). The issues on appeal are substantially similar to those in *Rhode Island* and *San Mateo*. The appeal is fully briefed, and oral argument is scheduled for May 6, 2020.

The district court, the Tenth Circuit, and Justice Sotomayor as Circuit Justice each denied defendants' motions to stay state court proceedings pending appeal from the remand order.<sup>5</sup> The case has been remanded to Colorado state court, where the parties have briefed motions to dismiss for failure to state a claim.

A stay of proceedings is not warranted pending resolution of the *Boulder* appeal, which, although potentially relevant, involves Colorado law and will not be binding on this Court.

***United States Supreme Court.*** There is a petition for certiorari pending before the United States Supreme Court arising from a decision of the Fourth Circuit that involved relevant issues. The question presented in that petition, however, relates only to the scope of appellate jurisdiction on appeal from district court orders granting remand to state court. If certiorari is granted, the Supreme Court's ruling will not likely inform or control any issue before this Court.

The petitioners in *BP p.l.c., et al. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S.) ("*Baltimore*"), defendants-appellants below, have sought certiorari review of the Fourth Circuit's order affirming remand of the City of Baltimore's complaint to Maryland state court. The *Baltimore* defendants removed

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<sup>5</sup> See *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 423 F. Supp. 3d 1066 (D. Colo. 2019) (denying motion for stay pending appeal); *Boulder*, Doc. 10110246153 (10th Cir. Oct. 17, 2019) (same); *Suncor Energy (U.S.A.), Inc., et al. v. Bd. of Cty. Comm'rs of Boulder Cty. et al.*, No. 19A428 (U.S. Oct. 22, 2019) (text order) (same).



the case, asserting the same eight grounds for removal raised here. The district court rejected each theory and granted Baltimore's motion to remand. *See generally Mayor & City Council of Baltimore v. BP p.l.c.*, 388 F. Supp. 3d 538 (D. Md. 2019). On March 6, 2020, the Fourth Circuit held that 28 U.S.C. § 1447(d) limited its appellate jurisdiction to reviewing the defendants' arguments for federal officer removal jurisdiction under 28 U.S.C. § 1442, and affirmed the district court's order remanding the case. *See generally Mayor & City Council of Baltimore v. BP p.l.c.*, 952 F.3d 452 (4th Cir. 2020).

The district court, Fourth Circuit, and the Supreme Court each denied motions by the defendants to stay state court proceedings pending their appeal from the district court's remand order.<sup>6</sup> The case has been remanded, and merits and discovery motion practice is proceeding in state court.

The defendants submitted their petition for certiorari on March 31, 2020. The opposition brief is due June 29, 2020. The question presented in the petition is:

Whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a case to state court here the removing defendants premised removal in part on the federal-office removal statute, 28 U.S.C. 1442, or the civil rights removal statute, 28 U.S.C. 1443.

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<sup>6</sup> *See Mayor & City Council of Baltimore v. BP p.l.c.*, No. CV ELH-18-2357, 2019 WL 3464667 (D. Md. July 31, 2019) (denying motion for stay pending appeal); *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 19-1644, Dkt. 116 (4th Cir. Oct. 1, 2019) (same); *BP p.l.c. et al. v. Mayor & City Council of Baltimore*, 140 S. Ct. 449 (Mem) (Oct. 22, 2019) (same).

*BP p.l.c., et al., v. Mayor and City Council of Baltimore*, Petition for Writ of Certiorari, No. 19-1189, 2020 WL 1557798, at \*1 (U.S. March 31, 2020). Even if the Supreme Court grants certiorari, the issues encompassed by the question presented, which bear only on the scope of appeals from remand orders, are not relevant to this Court's determination of the City's anticipated motion to remand. A stay is not warranted pending the Supreme Court's determination of the petition for certiorari in *Baltimore*, or of the merits if certiorari is granted.

In sum, a stay is appropriate pending resolution of the *San Mateo* and *Oakland* appeals before the Ninth Circuit. A stay is not appropriate pending resolution of the appeals before the First, Second, and Tenth Circuit, however, or the petition for certiorari before the Supreme Court.

**SHER EDLING LLP**

DATED: San Francisco,  
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By: /s/ Victor M. Sher

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