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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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| CITY AND COUNTY OF HONOLULU,<br><br>Plaintiff,<br><br>v.<br><br>SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA INC.; | CASE NO.: 20-cv-00163-DKW-RT<br><br>**DEFENDANTS' MOTION TO STAY EXECUTION OF REMAND ORDER PENDING APPEAL; MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY EXECUTION OF REMAND ORDER PENDING APPEAL;** |

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| BHP GROUP LIMITED; BHP GROUP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive,<br><br>Defendants. | **CERTIFICATE OF SERVICE**<br><br>No Hearing Date Calendared<br><br>Action Filed: March 9, 2020<br>No Trial Date Set |
| COUNTY OF MAUI,<br><br>Plaintiff,<br><br>v.<br><br>SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA INC.; BHP GROUP LIMITED; BHP GROUP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive,<br><br>Defendants. | CASE NO.: 20-cv-00470-DKW-KJM<br><br>**DEFENDANTS' MOTION TO STAY EXECUTION OF REMAND ORDER PENDING APPEAL; MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY EXECUTION OF REMAND ORDER PENDING APPEAL; CERTIFICATE OF SERVICE**<br><br>No Hearing Date Calendared<br><br>Action Filed: October 12, 2020<br>No Trial Date Set |

**DEFENDANTS' MOTION TO STAY EXECUTION OF REMAND ORDER PENDING APPEAL**

TO THE COURT, THE CLERK, AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT Defendants hereby move this Court to stay execution of the Court's February 12, 2021 Order (1) Granting Motion to Remand and (2) Remanding Action to State Circuit Court (the "Remand Order") until resolution of appellate proceedings regarding that order. *See* No. 20-cv-163, Dkt. 128; No. 20-cv-470, Dkt. 99. Defendants filed their notices of appeal on February 18, 2021. *See* No. 20-cv-163, Dkt. 132; No. 20-cv-470, Dkt. 102.

By way of this Motion, Defendants seek an order staying execution of the Remand Order, including, *inter alia*, staying the Clerk of the Court from mailing the Remand Order to the Circuit Courts of the State of Hawai`i, until final resolution of Defendants' appeals. Absent a stay, the parties and the state courts will likely be required to devote substantial time and resources to extensive litigation that the Ninth Circuit or the Supreme Court may later effectively nullify. At a minimum, there is a risk of inconsistent rulings and serious impairment of Defendants' appellate rights. All applicable factors to be considered by this Court weigh in favor of a stay. Defendants request oral argument.

In the event that the Court does not grant a stay pending appeal, Defendants request that the Court grant a temporary stay to preserve Defendants' right to seek a stay from the Ninth Circuit.

This Motion is based on this Notice of Motion and Motion to Stay, the Memorandum in support of the Motion, the papers on file in this case, any oral argument that may be heard by the Court, and any other matters that the Court deems appropriate.

DATED: February 18, 2021

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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| CITY AND COUNTY OF HONOLULU,<br><br>Plaintiff,<br><br>v.<br><br>SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA INC.; BHP GROUP LIMITED; BHP GROUP PLC; | CASE NO.: 20-cv-00163-DKW-RT<br><br>**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY EXECUTION OF REMAND ORDER PENDING APPEAL**<br><br>No Hearing Date Calendared<br><br>Action Filed: March 9, 2020<br>No Trial Date Set |

BHP HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive,

Defendants.

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COUNTY OF MAUI,

Plaintiff,

v.

SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA INC.; BHP GROUP LIMITED; BHP GROUP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive,

Defendants.

CASE NO.: 20-cv-00470-DKW-KJM

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY EXECUTION OF REMAND ORDER PENDING APPEAL**

No Hearing Date Calendared

Action Filed: October 12, 2020
No Trial Date Set

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## MEMORANDUM IN SUPPORT OF MOTION

## I. INTRODUCTION

To preserve the meaningfulness of Defendants' appellate rights and spare the parties and the Hawai'i Circuit Courts from what could be a substantial amount of unnecessary and ultimately futile litigation, Defendants respectfully request that the Court stay execution of its Order remanding these cases until the Ninth Circuit and, if needed, the Supreme Court have had the opportunity to determine whether these actions were properly removed. *See City and County of Honolulu v. Sunoco LP*, No. 20-cv-163-DKW-RT, Dkt. 128 (D. Haw.) ("*Honolulu*"); *County of Maui v. Chevron U.S.A. Inc.*, No. 20-cv-470-DKW-KJM, Dkt. 99 (D. Haw.) ("*Maui*") (the "Remand Order"). Defendants' appeals will present serious legal issues, including questions that are currently pending before the Supreme Court and questions of first impression in the Ninth Circuit. Absent a stay, Defendants face irreparable harm, whereas a stay would cause Plaintiffs no prejudice, and in fact would serve the public interest and the interests of judicial economy. Accordingly, the Court should stay execution of the Remand Order, including the Clerk's certification and mailing of the Remand Order to the state courts, pending the outcome of Defendants' appeals.

Defendants have an appeal as of right from the Remand Order because they removed this case under, *inter alia*, the federal officer removal statute, 28 U.S.C. § 1442. *See* 28 U.S.C. § 1447(d). This case presents several substantial legal

questions, including the scope of appellate review under the federal officer removal statute and whether Plaintiffs' purportedly state-law claims arise under federal law, which are currently pending before the Supreme Court. The District Court for the Northern District of California granted a stay of remand pending appeal in a similar case presenting similar questions, *see County of San Mateo v. Chevron Corp.*, No. 17-cv-04929, Dkt. 219 (N.D. Cal. Apr. 9, 2018), and the Ninth Circuit itself later stayed the mandate of its order affirming remand in that case pending Supreme Court review, *see County of San Mateo v. Chevron Corp.*, No. 18-15499, Dkt. 238 (9th Cir. Aug. 25, 2020). This case also raises the propriety of removing climate change–related nuisance claims under the Outer Continental Shelf Lands Act ("OCSLA") and federal enclave jurisdiction—issues that the Ninth Circuit has never addressed. And while some of Defendants' grounds for removal, in the Court's view, "have become less persuasive due to binding Ninth Circuit Court of Appeals precedent," Remand Order at 1–2, the Ninth Circuit will have before it a more robust factual record of evidence on that issue than the Ninth Circuit did previously.

It is appropriate for a court to stay remand pending appeal where doing so will avoid the "rat's nest of comity and federalism issues" that could arise upon the reversal of a remand order after months (or even years) of litigation in state court, during which time the state court could have invested substantial time and resources and made numerous rulings. *Northrop Grumman Tech. Servs., Inc. v. DynCorp.*

*Int'l, LLC*, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). Moreover, remanding to allow state court litigation to proceed while the parties are before the Ninth Circuit on appeal would undermine and potentially frustrate Defendants' appellate rights, needlessly impose costs and burdens on the courts and parties alike, and unduly complicate this litigation. Staying the Remand Order, on the other hand, would not prejudice Plaintiffs and would avoid irreparable harm to Defendants, conserve judicial resources, and serve the interests of judicial efficiency. At a minimum, the Court should enter a brief stay of the Remand Order to enable Defendants to seek a stay pending appeal from the Ninth Circuit.

## II. PROCEDURAL BACKGROUND

On March 9, 2020, Plaintiff City & County of Honolulu filed a Complaint in the First Circuit Court of Hawaii. *See City & County of Honolulu v. Sunoco LP, et al.*, No. 1CCV-20-0000380 (Haw. Cir. Ct.). On April 15, 2020, Defendants timely removed the case pursuant to 28 U.S.C. §§ 1331, 1334, 1441, 1442, 1446, 1452, and 1367(a), and 43 U.S.C. § 1349. *See Honolulu*, Dkt. 1. On October 12, 2020, Plaintiff County of Maui filed a Complaint in the Second Circuit Court of Hawai`i. *See County of Maui v. Sunoco LP, et al.*, No. 2CCV-20-0000283 (Haw. Cir. Ct.). On October 30, 2020, Defendants timely and properly removed the case pursuant to 28 U.S.C. §§ 1331, 1334, 1441, 1442, 1446, and 1367(a), and 43 U.S.C. § 1349. *See Maui*, Dkt. 1.

Plaintiffs in both actions filed motions to remand to state court, which the Court granted on February 12, 2021. *See Honolulu*, Dkt. 128; *Maui*, Dkt. 99.

## III. LEGAL STANDARD

District courts have the authority to stay entry of an order or judgment in proceedings pending before them. *See* Fed. R. App. P. 8(a)(1) ("A party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal."). This includes the authority to stay remand orders pending appeal. *See, e.g., Manier v. Medtech Prods., Inc.*, 29 F. Supp. 3d 1284, 1287 (S.D. Cal. 2014). In deciding whether to enter a stay, courts consider the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (per curiam) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). To establish that they are "likely to succeed on the merits," Defendants need show only that their appeal raises "serious legal questions"; Defendants "need not demonstrate that it is more likely than not that they will win on the merits." *Id.* at 966–68.

"The first two factors . . . are the most critical," *Nken*, 556 U.S. at 434, and the Ninth Circuit requires a moving party to demonstrate "that irreparable harm is

probable if the stay is not granted," *Leiva-Perez*, 640 F.3d at 968. But the likelihood of success, substantial injury, and public interest factors are balanced using a "sliding scale" approach, such that "'a stronger showing of one element may offset a weaker showing of another.'" *Id.* at 964 (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). Indeed, even if Defendants fail to show a strong likelihood of success on the merits, they "'may be entitled to prevail if [they] can demonstrate a substantial case on the merits and the second and fourth factors [irreparable injury and public interest] militate in [their] favor.'" *Sierra Club v. Trump*, 929 F.3d 670, 718 (9th Cir. 2019) (quoting *Nat'l Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 863 (9th Cir. 2007)).

## IV. ARGUMENT

### A. Defendants' Appeal Raises Many Serious Legal Questions About Federal Jurisdiction Over Climate Change–Related Nuisance Claims.

Defendants' appeal raises serious legal questions regarding this Court's subject matter jurisdiction. The Supreme Court has already heard argument in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S.), with a decision expected by June. Three more petitions for certiorari are currently pending before the Supreme Court in similar cases, including the Ninth Circuit's case relied upon by this Court (where, notably, remand to state court also has been stayed). *See Chevron Corp. v. San Mateo County*, No. 20-884 (U.S.); *see also Shell Oil Prods. Co. v. Rhode Island*, No. 20-900 (U.S.); *Suncor Energy (U.S.A.) Inc. v. Board of*

*County Commissioners of Boulder County*, No. 20-783 (U.S.). And a fourth pending petition for certiorari squarely raises the central question of whether claims like those asserted here are removable because they arise under federal law. *See Chevron Corp. v. City of Oakland*, No. 20-1089 (U.S.) This case also presents new and different issues that no appellate court has yet considered. If a stay is granted, Defendants' appeals from the Remand Order will enable the Ninth Circuit to address these issues now, before these cases go back to state court, thereby avoiding the risk of unnecessary litigation and inconsistent outcomes that may otherwise ensue.

**1. This Court's Remand Order Is Appealable as of Right.**

Defendants have a clear right to appeal from the Remand Order because they removed these cases under the federal officer removal statute. *See Honolulu*, Dkt. 1 ¶¶ 54–77; *Maui*, Dkt. 1 ¶¶ 22–123. While normally "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal," an "order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title *shall be* reviewable by appeal or otherwise." 28 U.S.C. § 1447(d) (emphasis added).

On appeal, Defendants believe that the Ninth Circuit may properly consider all bases for removal advanced by the removing parties. The plain language of 28 U.S.C. § 1447(d) authorizes review of the *order* remanding a case removed under Section 1442, not a portion of the order. 28 U.S.C. § 1447(d) ("An *order* remanding

a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an *order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.") (emphasis added). As the Seventh Circuit held in a thorough and well-reasoned opinion based on the plain language of Section 1447(d), "[t]o 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).

Although the Ninth Circuit held otherwise in *County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 598 (9th Cir. 2020) (citing *Patel v. Del Taco, Inc.*, 446 F.3d 996 (9th Cir. 2006)), the Supreme Court agreed to resolve the conflict in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S.). There is good reason to believe that the Supreme Court will agree with the Seventh Circuit that appellate jurisdiction lies over the entire Remand Order. Indeed, the Ninth Circuit itself also suggested that the Seventh Circuit may have adopted a better reading of the statute than the Ninth Circuit's earlier *Patel* decision: "Were we writing on a clean slate, we might conclude that *Lu Junhong* provides a more persuasive interpretation of § 1447(d) than *Patel*. Precedents, however, do not cease to be authoritative merely because counsel in a later case advances new arguments. Therefore, we remain

bound by *Patel* until abrogated by an intervening higher authority." *County of San Mateo*, 960 F.3d at 598–99.

The Supreme Court heard argument on January 19, 2021, and a decision is expected by the end of June. The outcome could have profound implications for appellate review of this Court's Remand Order because it could allow the Ninth Circuit to resolve the propriety of removing climate change–related nuisance claims under OCSLA and federal enclave jurisdiction, which no federal court of appeals has yet considered—and which present important questions of first impression.

**2. Defendants' Appeal Will Present Several Compelling Grounds for Federal Jurisdiction, Which the Ninth Circuit Will Be Able to Consider Anew.**

Regardless of the outcome of the *Baltimore* case, Defendants have a substantial likelihood of success on the merits because federal officer removal here rests on a different and more robust factual record than has ever previously been considered in a case asserting climate change–related nuisance claims. And if the Ninth Circuit *does* review the entire Remand Order, Defendants' appeal will also present several grounds for removal that no federal appellate court has yet considered—including OCSLA and federal enclave jurisdiction.

***First***, Defendants' appeals will present a substantial question regarding the propriety of removal under the federal officer removal statute. In denying removal on this ground, this Court emphasized its view that the Ninth Circuit's decision in

*San Mateo* imposed certain constraints. *See, e.g.*, Remand Order at 9–10 ("[T]he Court observes that this case hardly operates on a clean slate . . . . This is because the Ninth Circuit recently addressed that exact same issue in a similar lawsuit."); *id.* at 10 (noting "the tinged canvas upon which the Court writes"). While the Court acknowledged that Defendants presented substantial new evidence that the Ninth Circuit did not have before it in *San Mateo*, it viewed itself as bound by the limits imposed by that decision in evaluating this new evidence. *See, e.g.*, *id.* at 14 ("This Court is unconvinced that any of the supposedly additional or new arguments presented here alter the Ninth Circuit's holding that the leases do not give rise to an unusually close relationship with the federal government for purposes of Section 1442(a)(1)."); *id.* at 16 n.12 ("[I]n *San Mateo*, the Ninth Circuit observed that the oil and gas leases discussed earlier included terms for Defendants to pay royalties to the government. As discussed, the Ninth Circuit did not find the leases sufficient under Section 1442(a)(1). Thus, if the leases *in toto* do not create a Section 1442(a)(1) relationship, the Court cannot see how a part of those leases—royalties—could either.").

With a freer hand in reading its own precedent, however, there is a reasonable likelihood that the Ninth Circuit *will* find this new evidence sufficiently compelling to render a different outcome regarding the propriety of federal officer removal. This new evidence includes direct support for the very facts that the Ninth Circuit found

lacking in *San Mateo*, including evidence establishing that a Chevron predecessor acted "as the Navy's 'agent'" in operating the Elk Hills reserve and that Defendants' OCSLA leases "fulfill basic governmental duties" that the federal government would otherwise have had to perform. *San Mateo*, 960 F.3d at 602–03.

This new evidence also demonstrates that Defendants "acted under" federal officers in other ways that were not before the Ninth Circuit, as this Court appeared to recognize. The Court stated that it "will assume Defendants acted under a federal officer in (1) supplying specialized fuels to, and constructing pipelines for, the federal government during World War II, (2) supplying specialized fuels for certain spy or reconnaissance planes during the Cold War, and (3) supplying specialized jet fuels for the Department of Defense between 1983 and 2011." Remand Order at 12; *see id.* at 19 n.13. Other new evidence includes Defendants' activities extracting fuel from federal land through onshore leases administered by the Bureau of Land Management; supplying fuel for and managing the Strategic Petroleum Reserve; and supplying petroleum to the federal government under directives issued pursuant to the Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798. And this new evidence includes expert reports from two professors of history, Professors Tyler Priest and Mark Wilson, which explain in detail how Defendants acted under the direction, guidance, supervision, and control of federal officers. None of this evidence was before the Ninth Circuit or any other court that has ruled on federal

officer removal in similar circumstances.[1]

Evaluation of the causal nexus or "relating to" prong of federal officer removal also presents a substantial question. In *San Mateo*, the Ninth Circuit considered only three factual predicates for an "acting under" relationship, but the Court did not reach the question whether defendants had established a causal nexus. *See* 960 F.3d at 603. This Court took an opposite approach—it "assume[d] that Defendants acted under a federal officer" in at least three ways, Remand Order at 12, but concluded there was not a causal nexus to Plaintiffs' claims, *id.* at 18.

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[1] Plaintiffs may argue that Defendants are collaterally estopped from arguing federal officer removal before the Ninth Circuit in light of *San Mateo*, but this is incorrect. As an initial matter, "collateral estoppel . . . prevents parties from relitigating an issue of fact or law if the *same issue* was determined in prior litigation," *Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1114 (9th Cir. 1999) (emphasis added), which in turn depends on whether "there [is] a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first," *Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir. 1995). There is not a substantial overlap between *the evidence* in this action and that in *San Mateo* because the record supporting federal officer removal is different and significantly more robust here. *See Stross v. NetEase, Inc.*, 2020 WL 5802419, at *6 (C.D. Cal. Aug. 20, 2020) (finding "there is not a substantial overlap between the evidence and argument advanced in the two cases" because "Defendant offers several new factual allegations"); *cf. Stucky v. Hawaii*, 2010 WL 1372317, at *14 (D. Haw. Mar. 31, 2010) ("[T]he Court finds that the issues in Plaintiff's instant suit are identical to those litigated in her prior action" because "Plaintiff must necessarily rely on the same evidence."). In any event, the Ninth Circuit has inherent discretion whether to apply the doctrine of nonmutual offensive collateral estoppel, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329–31 (1979), and it is unlikely to do so here considering the importance of the underlying issues and the jurisdictional nature of the dispute.

Therefore, whether these additional activities proffered by Defendants here "relate to" Plaintiffs' claims has not been considered by the Ninth Circuit and presents a substantial question.

***Second***, Defendants have a substantial argument that OCSLA confers federal jurisdiction over this action. OCSLA gives federal district courts original jurisdiction over actions that "aris[e] out of, or in connection with . . . any operation conducted on the Outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the [OCS]." 43 U.S.C. § 1349(b)(1). While this Court held that OCSLA jurisdiction does not exist because Plaintiffs' claims do not "arise out of, or in connection with" Defendants' activities on the outer Continental Shelf, it acknowledged that the Ninth Circuit has never considered the scope of this jurisdictional phrase. *See* Remand Order at 7–8 (noting that "the Ninth Circuit has not clarified the scope of the jurisdictional reach of the OCSLA"). And it is well established that a question of first impression is sufficient to justify a stay. *See, e.g.*, *Delisle v. Speedy Cash*, 2019 WL 7755931, at *2 (S.D. Cal. Oct. 3, 2019) ("A 'substantial case' exists where the applicant's claims raise 'serious legal questions,' i.e., 'issue[s] of first impression' or issues causing a split in legal authority.") (quoting *Wilson v. Huuuge, Inc.*, 2019 WL 998319, at *2 (W.D. Wash. Mar. 1, 2019)); *In re Pacific Fertility Ctr. Litig.*, 2019 WL 2635539, at *3 (N.D. Cal. June 27, 2019) ("Courts . . . have found that the following constitute

serious legal issues: issues of first impression . . . ."). The Supreme Court's impending decision in *Baltimore* will soon make clear whether the Ninth Circuit can consider (and the extent to which the parties should brief) this issue on appeal of the Remand Order.

To the extent this Court's conclusion depends on its interpretation of Plaintiffs' Complaints as turning "*not* [on] [Defendants'] 'fossil fuel production activities,' but [on] their alleged *failure to warn* about the hazards of using their fossil fuel products and *disseminating* misleading information about the same," Remand Order at 8 (emphases in original), that conclusion itself presents a substantial question. Plaintiffs have made clear that the production of fossil fuels is a necessary predicate of their alleged injuries. *See Honolulu*, Dkt. 1, Exhibit A ¶ 1 (alleging that "unrestricted production and use of [Defendants'] fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate"); *id.* ¶ 2 (noting that "a massive increase in the extraction and consumption of oil, coal, and natural gas . . . has in turn caused an enormous, foreseeable, and avoidable increase in global greenhouse gas pollution and a concordant increase in the concentration of greenhouse gases"); *Maui*, Dkt. 1, Exhibit A ¶ 4 ("Defendants' fossil fuel products play[] a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution and increased atmospheric CO2 concentrations that have occurred since the mid-20th century.").

Defendants' federal officer removal arguments present a substantial legal question for similar reasons. Defendants have a reasonable theory of the case: that greenhouse gas emissions caused by billions of consumers' use of fossil fuels—which were produced, in part, at the federal government's direction allegedly resulted in Plaintiffs' purported harms. This theory of the case is more than plausible: indeed, there would be no alleged harm, and therefore no case, without the greenhouse gas emissions allegedly caused, in part, by the consumption of fossil fuel products, including those produced by Defendants at the direction of federal officers. As the Supreme Court and other circuit courts have made clear, when both parties have reasonable theories of the case, the Defendants' theory must be credited for purposes of federal officer removal. *See Baker v. Atlantic Richfield Co.*, 962 F.3d 937, 941, 947 (7th Cir. 2020) ("Both the [plaintiffs] and the [defendants] have reasonable theories of this case. Our role at this stage of the litigation is to credit only the [defendants]' theory" so long as the theory is "plausible."); *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 432–33 (1999) ("Accordingly, we credit the [defendants]' theory of the case for purposes of . . . our jurisdictional inquiry."; defendants need not have "an airtight case on the merits" to show the requisite causal connection). Moreover, courts have found that there need only be a "'connection' or 'association' between the act in question and the federal office" to justify removal. *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender*

*Ass'n of Philadelphia*, 790 F.3d 457, 471 (3d Cir. 2015); *see also Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (holding that "for or relating to" standard was met where claim was "connected with" the conduct under federal officer direction). This Court, however, declined to credit Defendants' theory, noting that it was dissimilar to another case in which "the very act" that formed the basis of plaintiffs' claims was allegedly performed under the government's direction. *See* Remand Order at 17–18 ("Defendants' theory of the case is not a theory for *this* case, like the one in *Leite*."). The standard imposed in this case runs contrary to federal officer removal case law in other circuits, thereby creating a "split in legal authority" and a substantial legal question. *Delisle*, 2019 WL 7755931, at *2. Whether a plaintiff can avoid federal jurisdiction by ignoring the allegations in its own complaint is a serious question with implications far beyond this case.

***Third***, the propriety of federal enclave jurisdiction also presents a serious legal question. *See Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) ("Federal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'"). Plaintiffs do not dispute that Defendants conduct substantial fossil fuel production on federal enclaves. The Court concluded that this production is irrelevant because "the relevant conduct here" is "the warning and disseminating of information about the hazards of fossil fuels," and "there is no

dispute such conduct did not occur on a federal enclave." Remand Order at 21. As discussed above, however, this reading of the Complaints is itself, at a minimum, open to different interpretations. *See supra* at 14. And even if Plaintiffs' claims are based in part on alleged misrepresentations that did not occur on federal enclaves, that does not defeat federal jurisdiction so long as "*some of the events* alleged . . . occurred on a federal enclave." *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010) (emphasis added); *see also Jones v. John Crane-Houdaille, Inc.*, 2012 WL 1197391, at *1 (D. Md. Apr. 6, 2012) ("A suit based on events occurring in a federal enclave . . . implicates federal question jurisdiction under § 1331."). While the Court observed that Plaintiffs "disavow relief for injuries to federal property," Remand Order at 21, federal jurisdiction exists as long as some of the relevant conduct occurred on a federal enclave, regardless of where plaintiffs happened to be at the time of the alleged injury, *see Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010) (finding that jurisdiction lies where at least "some of the events alleged . . . occurred on a federal enclave," regardless of an attempt to disclaim those events).

***Fourth***, Defendants have a "reasonable probability" of demonstrating that removal was proper because Plaintiffs' claims are necessarily governed by federal common law, involve a substantial and necessary federal element under *Grable*, or are completely preempted. *See* Remand Order at 2 n.1 ("[T]he Court acknowledges

that Defendants persist in raising [these] other grounds for removal in order to preserve those grounds for appellate review."); *City of New York v. B.P. p.l.c.*, 325 F. Supp. 3d 466, 472 (S.D.N.Y. 2018) (holding that substantially similar claims arise under federal common law). Petitioners in *Baltimore* raised the question whether climate change–related nuisance claims fall within federal courts' federal question jurisdiction because they necessarily arise under federal common law. *See* Brief for the Petitioners at 37–45, *BP p.l.c. v. Mayor & City Council of Baltimore* (No. 19-1189).[2] And another certiorari petition is currently pending before the Supreme Court directly presenting this question. *See* Petition for a Writ of Certiorari at i, *Chevron Corp. v. City of Oakland* (No. 20-1089) ("Whether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law."). This is a substantial issue and, again, the Supreme Court's impending decision in *Baltimore*, will soon make clear whether the Ninth Circuit can consider (and the extent to which the parties should brief) this issue on appeal of the Remand Order.

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[2] At oral argument, the United States confirmed that Baltimore's claims, like Plaintiff's claims here, "are inherently federal in nature." Tr. at 31:4-5. The United States explained that although Baltimore "tried to plead around th[e Supreme] Court's decision in *AEP*, its case still depends on alleged injuries to the City of Baltimore caused by emissions from all over the world, and those emissions just can't be subjected to potentially conflicting regulations by every state and city affected by global warming." Tr. at 31:7-13.

**B. Defendants Will Suffer Irreparable Harm Absent a Stay.**

Once the clerk mails the certified copy of the Remand Order to the state courts, "the State Court may thereupon proceed with such case." 28 U.S.C. § 1447(c). Absent a stay of the Remand Order, the parties will therefore proceed simultaneously along at least two tracks: they will brief and argue Defendants' appeals from the Remand Order in the Ninth Circuit while litigating Plaintiffs' nuisance claims in two different state courts.

Denying the stay motion could render Defendants' right to appeal hollow if the state court undertakes to issue rulings on the merits. *Cf. Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) ("Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable."); *Hiken v. Dep't of Def.*, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (balance of hardships tipped in favor of granting stay because right to appeal an order to disclose information "would become moot" absent a stay). Because any "intervening state court judgment or order could render the appeal meaningless," Defendants face "severe and irreparable harm if no stay is issued." *Northrop Grumman*, 2016 WL 3346349, at *4.

In addition, Defendants would be irreparably harmed if they are forced to litigate simultaneously their federal appeal and the remanded state court actions. Even if Defendants' appeal is expedited, the proceedings in the Ninth Circuit will

require a substantial period of time. During that time, the state courts could rule on various substantive and procedural motions, including dispositive motions in which the parties' claims and defenses are adjudicated. It is also possible that the state courts will decide discovery motions. And there is a concrete and substantial risk that these motions would be decided differently than they would be in federal court. For example, Plaintiffs may argue that Hawai`i state courts have different pleading standards or discovery rules than federal courts, raising the possibility that the outcome of these motions in state court would be different than in federal court. There is no way to un-ring the bell as a practical matter because Defendants are unlikely to recover much (if any) of their burden and expense of discovery costs from the governmental Plaintiffs in this case. Such unrecoverable expenses constitute irreparable harm. *See Raskas v. Johnson & Johnson*, 2013 WL 1818133, at *2 (E.D. Mo. Apr. 29, 2013); *Citibank, N.A. v. Jackson*, 2017 WL 4511348, at *2 (W.D.N.C. Oct. 10, 2017) (granting motion to stay remand and noting litigation costs would be avoided); *cf. Golden Gate Rest. Ass'n v. City & Cty. of S.F.*, 512 F.3d 1112, 1125 (9th Cir. 2008) (considering "otherwise avoidable financial costs" in irreparable harm analysis). These same considerations have led a number of courts wrestling with these climate-change nuisance cases to stay proceedings pending clarity from the Supreme Court.

Moreover, if the Ninth Circuit ultimately concludes that Defendants properly removed this action, this Court would have to wrestle with the effects of any state court rulings made while the Remand Order was on appeal. Among other things, the Court would need to revisit the scope of any discovery orders, determine whether and to what extent any discovery that was improperly ordered may be clawed back or subjected to protective orders, evaluate the precedential or persuasive force of any intervening merits orders issued by the state court, and more. This would create a "rat's nest of comity and federalism issues" that would need to be untangled if the Ninth Circuit reverses. *Northrop Grumman*, 2016 WL 3346349, at *4.

"District courts have been sensitive to concerns about forcing parties to litigate in two forums simultaneously when granting stays pending appeal," *id.* at *3, and routinely grant motions to stay remand orders pending appeal precisely because of the risk of inconsistent outcomes and other burdens posed by simultaneous litigation in state and federal courts. *See, e.g.*, *id.* (entering stay because, "[i]f this order is not stayed, Plaintiff and Defendant will also both face the burden of having to simultaneously litigate the appeal before the Fourth Circuit and the underlying case in state court"); *Raskas*, 2013 WL 1818133, at *2 (staying remand order due to risk of "inconsistent outcomes if the state court rules on any motions while the case is pending" on appeal); *Dalton v. Walgreen Co.*, 2013 WL 2367837, at *2 (E.D. Mo. May 29, 2013) (granting stay to guard against "potential of inconsistent outcomes if

the state court rules on any motions while the appeal is pending"); Order Granting Motions to Stay. Dkt. 219, *County of San Mateo v. Chevron Corp.*, No. 17-cv-04929 (N.D. Cal. Apr. 9, 2018).

**C. The Balance of Harms Tilts Sharply in Defendants' Favor.**

"Where, as is the case here, the government is the opposing party," the third and fourth stay factors (*i.e.*, harm to the opposing party and the public interest) "merge" and should be considered together. *Leiva-Perez*, 640 F.3d at 970. Plaintiffs will not be harmed if the Court grants Defendants' Motion. In fact, they will benefit from a stay. With a stay in place, Plaintiffs will avoid the same risk of harm from potentially inconsistent outcomes in remanded state court proceedings as will Defendants. *See Raskas*, 2013 WL 1818133 at *2. Similarly, a stay would conserve Plaintiffs' resources—financial and otherwise—by allowing them to litigate Defendants' appeal without being saddled with simultaneous state court litigation. *See Dalton*, 2013 WL 2367837, at *2 ("[N]either party would be required to incur additional expenses from simultaneous litigation."). Moreover, "conserving judicial resources and promoting judicial economy" is a recognized ground for a stay, and a stay here would prevent the state courts from being burdened by potentially unnecessary litigation. *See Raskas*, 2013 WL 1818133 at *2; *see also United States v. Real Prop. & Improv. Located at 2366 San Pablo Ave., Berkeley, Cal.*, 2015 WL

525711, at *5 (N.D. Cal. Feb. 6, 2015) (noting that there is "a cognizable public interest in promoting judicial economy"); *Citibank*, 2017 WL 4511348, at *3.

Plaintiffs' claimed ability to recover damages will not be prejudiced by any stay. It is "well established . . . that such monetary injury is not normally considered irreparable." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). And this is especially true here because a substantial amount of the damages Plaintiffs seek to recover would be compensation for purported costs that they have not yet incurred and which they may not incur for decades. *See, e.g.*, *Honolulu* Compl. ¶ 10 ("[T]he average sea level *will rise* substantially along the City's coastline") (emphasis added); *id.* ("[E]xtreme weather . . . *will become* more frequent, longer-lasting, and more severe") (emphasis added). Any delay would not substantially harm Plaintiffs in their pursuit of equitable relief to "abate[] harms," *id.*, Prayer for Relief, which cannot be measurably exacerbated during a stay. And while "a stay would not permanently deprive [Plaintiffs] of access to state court," Defendants "face[] a real chance that [their] right to meaningful appeal will be permanently destroyed by an intervening state court judgment." *See Northrop Grumman*, 2016 WL 3346349, at *4.

## V. CONCLUSION

For the foregoing reasons, the Court should grant the motion and stay execution of the Remand Order pending appeal. If the Court decides not to grant a

stay pending appeal, Defendants ask that it grant a temporary stay to preserve Defendants' right to seek a stay from the Ninth Circuit.

DATED: February 18, 2021

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

| | |
|---|---|
| CITY AND COUNTY OF HONOLULU,<br><br>Plaintiff,<br><br>v.<br><br>SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; | CASE NO.: 20-cv-00163-DKW-RT<br><br>**CERTIFICATE OF SERVICE**<br><br>No Hearing Date Calendared<br><br>Action Filed: March 9, 2020<br>No Trial Date Set |

CHEVRON CORP; CHEVRON USA INC.; BHP GROUP LIMITED; BHP GROUP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive,

Defendants.

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COUNTY OF MAUI,

Plaintiff,

v.

SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORP; CHEVRON USA INC.; BHP GROUP LIMITED; BHP GROUP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; AND DOES 1 through 100, inclusive,

Defendants.

CASE NO.: 20-cv-00470-DKW-KJM

**CERTIFICATE OF SERVICE**

No Hearing Date Calendared

Action Filed: October 12, 2020
No Trial Date Set

**CERTIFICATE OF SERVICE**

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