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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

CITY AND COUNTY OF HONOLULU Plaintiff, v. SUNOCO LP, et al., Defendants.	CASE NO. 20-CV-00163-DKW-RT **OPPOSITION TO DEFENDANTS' MOTION TO STAY**
COUNTY OF MAUI, Plaintiff, v. SUNOCO LP, et al., Defendants.	CASE NO. 20-CV-00470-DKW-KJM

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I. INTRODUCTION

The circumstances of this case have not changed since the last time the Court denied a stay pending appeal, and Defendants still do not come close to satisfying any of the factors that could support a stay. The Court should again prevent further delay by denying Defendants' Motion to Stay Execution of Remand Order Pending Appeal, Dkt. No. 133 ("Stay Motion"), and allowing the case to proceed in state court, where it belongs.

This Court has twice held that a stay of remand proceedings pending resolution of appeals in other cases is not warranted. The Court entered a stay in the *Honolulu* action on May 1, 2020, pending resolution of the appeals then before the Ninth Circuit Court of Appeals in *County of San Mateo et al. v. Chevron Corp. et al.*, Case Nos. 18-15499, 18-15502, 18-15503, 18-16376 (9th Cir.); and *City of Oakland et al. v. B.P. PLC et al.*, No. 18-16663 (9th Cir.). *See* Case No. 1:20-cv-00163-DKW-RT, Dkt. No. 80. After decisions issued in those cases, the Court lifted the stay, finding:

> There is not a strong likelihood of acceptance of certiorari or reversal; Defendants in this case will not be 'irreparably injured absent a stay'; a further stay will, however, 'substantially injure' Plaintiff by unnecessarily prolonging these proceedings for an indeterminate amount of time; and there is 'always a public interest' in the 'prompt' resolution of a dispute.

Case No. 1:20-cv-00163-DKW-RT, Dkt. No. 111 (Aug. 21, 2020) (citing *Nken v. Holder*, 556 U.S. 418, 434, 436 (2009)). The Court denied the Defendants' motion

to reconsider the stay in light of the Ninth Circuit's decision to stay its mandate in the *San Mateo* matter, holding in relevant part that "the Court remains unpersuaded that the contingent utility of a stay in this case outweighs proceeding in the normal course . . . ." *See* 1:20-cv-00163-DKW-RT, Dkt. No. 115 (Sept. 9, 2020). Those two decisions remain appropriate, and the Court should proceed by permitting the Clerk of Court to transmit the February 12, 2021 Order granting the Plaintiffs' motions to remand to state court, Dkt. No. 128 ("Remand Order"), to the clerks of the First and Second Circuit Courts.

The pending decision by the United States Supreme Court in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189, 2020 WL 5847132 (U.S. Oct. 2, 2020), does not call for a different result. The narrow question before the Court in that case involves the scope of appellate jurisdiction provided by 28 U.S.C. § 1447(d) over orders granting remand to state court. The petitioners have asked the Court to consider the merits of their jurisdictional theory based on federal common law, but as the respondent in that case has argued, that issue was not ruled on by the court of appeals, and was not part of the Question Presented nor meaningfully briefed in the petition for certiorari. *See* Brief for Respondent, *Baltimore*, No. 19-1189, 2020 WL 7634393, at *41–44 (U.S. Dec. 16, 2020). Even if the Supreme Court sides with the petitioners on the jurisdictional issue, it is highly likely that the case will be remanded to the court of appeals for further consideration on the merits. In

the *Baltimore* case itself, moreover, the district court, circuit court, and Supreme Court all denied stays pending appeal, *see* Part IV.A, *infra*, and the case was remanded to the state court, where it remains. The Court should reach the same result here.

Nor do the four pending certiorari petitions Defendants cite justify a stay. The three petitions in *Chevron Corp. v. County of San Mateo*, No. 20-884 (U.S. Dec. 30, 2020); *Shell Oil Prods. Co. v. Rhode Island*, No. 20-900 (U.S. Dec. 30, 2020); and *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 20-783 (U.S. Dec. 4, 2020), pose identical questions to those in *Baltimore*, and will likely be fully resolved by the *Baltimore* decision. The petition in *Chevron Corp. v. City of Oakland*, No. 20-1089 (U.S. Jan. 8, 2020), asks the Supreme Court to adopt defendants' novel theory of removal jurisdiction based on federal common law that the Ninth Circuit rejected. The *Oakland* panel "unanimously voted to deny" the defendants' petition for rehearing, and "no Judge [of the full Ninth Circuit] requested a vote on whether to rehear the matter en banc." *City of Oakland v. BP PLC*, 969 F.3d 895, 901 (9th Cir. 2020). There is little chance that the Supreme Court will grant certiorari, and less still that it will reverse the Ninth Circuit.

All the factors that previously weighed against staying remand proceedings in these cases continue to weigh against staying the Remand Order now. The Order should be allowed to go into effect.

II. BACKGROUND

A. The *Baltimore* Case

A brief review of other pending appeals provides context for Defendants' Stay Motion. In *Baltimore*, the plaintiff city filed suit against various fossil fuel defendants, asserting state-law claims. *See Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 457 (4th Cir. 2020) ("*Baltimore II*"). There, as in this case, "Baltimore d[id] not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil fuel products; [rather,] it is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change." *Id.* at 467. The defendants in *Baltimore*, like here, wrongfully removed that case. *Id.* at 457. The plaintiff filed a motion to remand, which the district court granted. *See Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 555 (D. Md. 2019) ("*Baltimore I*").

Following the remand decision, the district court denied the defendants' motion to stay pending appeal, *Mayor & City Council of Baltimore v. BP P.L.C.*, No. CV ELH-18-2357, 2019 WL 3464667, at *1 (D. Md. July 31, 2019), as did the Fourth Circuit, *see* Decl. of Victor M. Sher in Support of Opposition to Motion to Stay ("Sher Decl.") Ex. 1. On the merits, the Fourth Circuit affirmed the district

court's order granting remand. *See Baltimore II*, 952 F.3d 452. The defendants again sought a stay, this time filing an application with the Supreme Court to stay the Fourth Circuit's mandate. The Supreme Court denied that application. *BP p.l.c. v. Mayor & City Council of Baltimore*, 140 S. Ct. 449 (2019). The mandate issued on March 30, 2020. Sher Decl. Ex. 2.

Meanwhile, the defendants filed a petition for writ of certiorari, presenting just one question for review by the Supreme Court:

> 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 removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil rights removal statute, 28 U.S.C. 1443.

Petition for a Writ of Certiorari, *BP p.l.c., et al., v. Mayor & City Council of Baltimore*, No. 19-1189, 2020 WL 1557798, at *I (U.S. Mar. 31, 2020). The Court granted the petition and heard oral argument on January 19, 2021.

B. The *Oakland* and *San Francisco* Cases

In *Oakland*, the City of Oakland and the City and County of San Francisco also filed suits against fossil fuel defendants, asserting claims for public nuisance under California law based on the defendants' alleged campaign of deception concerning climate change. 969 F.3d at 901–02. The defendants in *Oakland*, like here, wrongfully removed the cases to federal court, where the cases were related. *Id.* The plaintiffs filed a motion to remand, and the district court "denied the motion,

concluding that it had federal-question jurisdiction under 28 U.S.C. § 1331 because the Cities' claim was 'necessarily governed by federal common law.'" *Id*. The Ninth Circuit rejected the district court's reasoning and vacated the order denying remand, finding in relevant part that there was no subject-matter jurisdiction under the well-pleaded complaint rule, *Grable* jurisdiction, or complete preemption. *Id.* at 911–12.

On January 8, 2021, the *Oakland* defendants filed a petition for a writ of certiorari, seeking review of two questions, only the first of which is relevant here:

> I. Whether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law.
>
> II. Whether a plaintiff is barred from challenging removal on appeal after curing any jurisdictional defect and litigating the case to final judgment in the district court.

Petition for a Writ of Certiorari at i, *Chevron Corporation, et al., v. City of Oakland et al.* (filed Jan. 8, 2021).[1] The response is due May 10, 2021. Even if the Court grants the petition, briefing and argument will likely take several months, meaning the case is unlikely to be decided until the end of 2021, or more likely in 2022.

III. LEGAL STANDARD

A stay pending appeal "is not a matter of right," but "is instead 'an exercise of judicial discretion,'" with the "party requesting a stay bear[ing] the burden of showing that the circumstances justify an exercise of that discretion." *Nken*, 556 U.S.

[1] *Available at* https://www.supremecourt.gov/DocketPDF/20/20-1089/165661/20210108102043614_Petition%20for%20a%20Writ%20of%20Certiorari.pdf

at 423, 433–34 (citations omitted). The moving party bears a "heavy burden" in seeking this "extraordinary relief." *Winston–Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971).

The Court must weigh four 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 harmed 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*, 556 U.S. at 434). In the Ninth Circuit, these factors are weighed on a sliding scale that requires a party seeking a stay to show irreparable harm and either "(a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and the balance of hardships tips sharply in the [applicant's] favor." *Id.* at 970.

No stay may issue without a finding that the threatened harm to the moving party is truly "irreparable" and that such irreparable harm is at least probable. *See Nken*, 556 U.S. at 430 (the "possibility standard is too lenient"); *id.* at 434–35. "A showing of a probability, not just possibility, of harm is the 'bedrock requirement,' and 'stays must be denied to all petitioners who did not meet the applicable irreparable harm threshold, regardless of their showing on the other stay factors.'" *Tacey Goss P.S. v. Barnhart*, No. C13-800MJP, 2013 WL 4761024, at *4 (W.D.

Wash. Sept. 4, 2013) (quoting *Leiva-Perez*, 640 F.3d at 965); *see Nken*, 556 U.S. at 434–35 ("Although [deportation] is a serious burden for many aliens, it is not categorically irreparable."). Because the bar for "irreparable" harm is so high, a court "cannot base stay decisions on assumptions and 'blithe assertions'" by the moving party. *Leiva-Perez*, 640 F.3d at 970 (quoting *Nken*, 556 U.S. at 436).

IV. ARGUMENT

A. Defendants Have Not Come Close to Showing a Likelihood of Success on the Merits of Their Appeal.

The first *Nken* factor asks "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Nken*, 556 U.S. at 426. The Ninth Circuit has recognized that "courts routinely use different formulations to describe this factor," but "many of these formulations, including 'reasonable probability,' 'fair prospect,' 'substantial case on the merits,' and 'serious legal questions raised,' are largely interchangeable." *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (cleaned up). Each of them requires "that, at a minimum, a petitioner must show that there is a substantial case for relief on the merits." *Id.* (citations omitted). This factor thus asks "in essence, whether the stay petitioner has made a strong argument on which he could win." *Leiva-Perez*, 640 F.3d at 968.

There is no single, all-encompassing standard to determine whether a movant has shown a substantial case for relief, but courts have "found that the following constitute serious legal issues: issues of first impression within the Ninth Circuit,

questions of constitutionality, splits in authority on important legal issues, and open questions as to whether a California Supreme Court case was preempted by" federal law. *See In re Pac. Fertility Ctr. Litig.*, No. 18-CV-01586-JSC, 2019 WL 2635539, at *3 (N.D. Cal. June 27, 2019) (citations omitted) (collecting cases). None of those circumstances, or anything like them, is present here. Each of Defendants' purported serious legal issues is insufficient to justify a stay.

Federal Officer Removal: Defendants do not argue that there is a question of first impression, a split of authority, or any other relevant consideration that pertains to federal officer removal. They argue only that they have presented "new evidence" that was not in the record in the *San Mateo* case, which the Ninth Circuit might find "sufficiently compelling to render a different outcome" under § 1442. Stay Motion at 9. Courts routinely find no serious legal issue is presented, however, where the movant does not challenge any applicable legal standard and instead merely "dispute[s] the Court's application of well-settled . . . Ninth Circuit law to the facts of this case." *See Pac. Fertility Ctr. Litig.*, 2019 WL 2635539, at *3. Defendants' argument that they have supplied "the very facts that the Ninth Circuit found lacking in *San Mateo*" to satisfy § 1442's "acting under" requirement, *see* Stay Motion at 9–10, boils down to a contention that this Court incorrectly applied the law to the facts. But Defendants' "rehash of arguments the Court previously considered and rejected at length fails to raise a serious legal question; otherwise,

every time a party disagreed with a court's ruling, a serious question would exist." *Pac. Fertility Ctr. Litig.*, 2019 WL 2635539, at *3. Defendants' factual arguments thus fail.

The only *legal* argument Defendants present is that the Court did not sufficiently "credit" their "theory of the case," and that alleged failure allegedly implicates split of authority. *See* Stay Motion at 14–15. That contention fails for multiple reasons. First, the Court need only credit a defendant's theory of the case with respect to the "causal nexus" and "colorable federal defense" elements of federal officer removal, not the "acting under" element. *See Leite v. Crane Co.*, 749 F.3d 1117, 1124 (9th Cir. 2014); *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 432 (1999). Because Defendants have failed to show they were ever acting under a federal superior when they engaged in their alleged tortious conduct, they would not have a substantial likelihood of success even if this Court had misapplied the law as to the other two elements, which it did not.

Second, the Court was correct that "Defendants' theory of the case is not a theory for *this* case," and that their interpretation of *Acker* and *Leite* would permit them to "assert *any* theory of the case, however untethered to the claims of Plaintiffs," while "completely ignor[ing] the requirement that there must be a causal connection *with the plaintiff's claims*." Remand Order at 19. Defendants cite no authority for the proposition that they may recast the Complaint as they please to

reveal its supposed true basis, and instead repeat the general proposition that their "theory" must be "credit[ed]." *See* Stay Motion at 15. That does not present a serious legal issue.

Finally, to the extent Defendants attempt to argue, again, that "there need only be a 'connection' or 'association,' between the act in question and the federal office to justify removal," Motion to Stay at 14 (citation omitted), that would not support a stay for two reasons. First, Defendants' only support for their argument is out-of-circuit authority which held that the Removal Clarification Act of 2011 relaxed the causal connection requirement by adding the words "or relating to" to 28 U.S.C. § 1442(a). *See In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Philadelphia*, 790 F.3d 457, 471 (3d Cir. 2015), *as amended* (June 16, 2015); *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020). However, the Ninth Circuit's application of its "causally connected" standard, *County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 598 (9th Cir. 2020) ("*San Mateo II*"), remains consistent with the language and purpose of § 1442 as amended. *See Ulleseit v. Bayer HealthCare Pharm. Inc.*, 826 F. App'x 627, 629 n.2 (9th Cir. 2020) ("We do not think there is a meaningful difference between the causal nexus requirement articulated by our pre-2011 cases and the requirement imposed by the amended statute."). Second, multiple courts in analogous cases, including the First and Fourth Circuits, applied the "relaxed" standard Defendants advocate, and

all found Defendants still failed to satisfy the test. *See, e.g., Rhode Island v. Shell Oil Prod. Co.*, 979 F.3d 50, 59–60 (1st Cir. 2020); *Baltimore II*, 952 F.3d at 466–67. There is no serious legal issue presented here.

OCSLA: Defendants' argument that they have a substantial likelihood of success on appeal with respect to OCSLA approaches frivolity. First, as Defendants concede, that issue is not reviewable on appeal. *See* Stay Motion at 13; *San Mateo II*, 960 F.3d at 598 ("[W]e may review the district court's remand order only to the extent it addresses § 1442(a)(1)."). They argue that the Supreme Court might reverse that precedent in the *Baltimore* case and hold that the Ninth Circuit "can consider" their OCSLA arguments. Stay Opp. at 13. As their own words suggest, the Supreme Court could hold in *Baltimore* that courts of appeal are *permitted* but not *required* to consider grounds for removal other than federal officer jurisdiction on appeal from orders granting remand. Or it could simply affirm, which would also affirm the Ninth Circuit's precedent. In any event, Defendants' position depends on the quadruple inference that the Supreme Court will overturn the Ninth Circuit's appellate jurisdiction jurisprudence under 28 U.S.C. § 1447(d), the Ninth Circuit will decide to review issues in the Remand Order beyond the claim for federal officer jurisdiction, the Ninth Circuit will adopt Defendants' preferred standard for OCSLA removal, and the Ninth Circuit will then reverse this Court. That is far from showing of a likelihood of success.

Second, just as with federal officer removal, every court that has considered Defendants' OCSLA jurisdiction arguments has rejected them. *See County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938–39 (N.D. Cal. 2018) ("*San Mateo I*"); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 978 ("*Boulder I*"); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 151–52 (D.R.I. 2019) ("*Rhode Island I*"); *Baltimore I*, 388 F. Supp. 3d at 566. There is no meaningful likelihood that Defendants will succeed in the Ninth Circuit.

Enclave Jurisdiction: Defendants' federal enclave arguments fail for the same reasons as their OCSLA arguments. They will first have to win in the Supreme Court before the Ninth Circuit could consider it, and even if they do, no court anywhere has agreed with their position. *See San Mateo I*, 294 F. Supp. 3d at 939; *Boulder I*, 405 F. Supp. 3d at 974–975; *Rhode Island I*, 393 F. Supp. 3d at 152; *Baltimore I*, 388 F. Supp. 3d at 564–566. The two district court opinions they cite in their Stay Motion have both already been presented to this Court, and "like every other court to have addressed this issue, the Court [found] that federal enclave jurisdiction does not exist over Plaintiffs' claims." Remand Order at 21. Defendants' have no likelihood of succeeding on the merits of their enclave jurisdiction argument.

Federal Common Law, *Grable*, and Complete Preemption: Defendants' remaining arguments are overtly frivolous, because they demand the conclusion that

either the Supreme Court or a subsequent panel of the Ninth Circuit will reverse the recently minted *Oakland* decision. *See* Stay Motion at 16–17. Defendants' positions regarding *Grable* and complete preemption were both squarely rejected by the Ninth Circuit in *Oakland*, with Defendants' petitions for rehearing and rehearing *en banc* denied unanimously. *See* 969 F.3d at 901, 906–08. Defendants note that the *Oakland* petition for certiorari from that decision asks the Supreme Court to consider whether those plaintiffs' claims "fall within federal courts' federal question jurisdiction because they necessarily arise under federal common law," Stay Motion at 17, but carefully avoid stating that the petition does not challenge the Ninth Circuit's rulings on *Grable* and complete preemption.[2] It is unlikely in the extreme that the Supreme Court will accept certiorari, reach beyond the questions argued by Defendants, and reverse the Ninth Circuit's application of *Grable* or complete preemption.

As to federal common law, Defendants' jurisdictional theory is meritless for the reasons district courts and the Ninth Circuit have repeatedly identified. First, "the

[2] The *Oakland* defendants argue that while the Ninth Circuit held "putative state-law claims are removable under 28 U.S.C. §§ 1331 and 1441 only if they satisfy *Grable* or are completely preempted by federal statute," the "[Supreme] Court's decisions establish another path for removal: Because federal law *exclusively* governs interstate-pollution claims, such a claim necessarily arises under federal law and is removable to federal court." *See* Petition for a Writ of Certiorari, *Chevron Corp., et al., v. City of Oakland et al.*, at 14. The petition does not argue that the Ninth Circuit applied an incorrect standard or even misapplied the correct standard for *Grable* or complete preemption, and instead advocates only their novel federal common law theory.

Supreme Court has not yet determined that there is a federal common law of public nuisance relating to interstate pollution," and to the extent there were ever cognizable federal common law claims that resemble the Plaintiffs' claims here, they were "displaced by the Clean Air Act." *Oakland*, 969 F.3d at 906; *San Mateo I*, 294 F. Supp. 3d at 937 ("Simply put, these cases should not have been removed to federal court on the basis of federal common law that no longer exists.").

Second, Defendants' theory is irreconcilable with the well-pleaded complaint rule and all its exceptions and applications, as multiple courts have found, including the Ninth Circuit. *See Oakland*, 969 F.3d at 906 ("Even assuming that the Cities' allegations could give rise to a cognizable claim for public nuisance under federal common law, . . . the district court did not have jurisdiction under § 1331 because the state-law claim for public nuisance fails to raise a substantial federal question."); *Baltimore I*, 388 F. Supp. 3d at 555 ("Defendants' assertion that the City's public nuisance claim under Maryland law is in fact 'governed by federal common law' is a cleverly veiled preemption argument."); *Boulder I*, 405 F. Supp. 3d at 963 (Defendants "fail to cite any Supreme Court or other controlling authority authorizing removal based on state law claims implicating federal common law."); *Rhode Island I*, 393 F. Supp. 3d at 148 ("The problem for Defendants is that there is nothing in the artful-pleading doctrine that sanctions this particular

transformation."). There is no serious likelihood Defendants will succeed on the merits of their federal common law argument.

Notably, in the few days since Defendants filed their Stay Motion, a Northern District of California court rejected identical federal common law arguments in a water pollution case unrelated to climate change. The plaintiffs in *Earth Island Institute v. Crystal Geyser Water Co.*, No. 20-CV-02212-HSG, 2021 WL 684961, at *1 (N.D. Cal. Feb. 23, 2021), brought state law claims in California state court against "several food, beverage, and consumer goods companies," alleging that the defendants caused injurious "plastic pollution in California coasts and waterways" by selling plastic products "without sufficient warning of known dangers" and making misleading "statements to the public regarding those dangers." The defendants removed, arguing in relevant part that "federal jurisdiction exists because Plaintiff's causes of action necessarily turn on federal common law, such that federal common law *must* govern interstate pollution or public nuisance cases." *Id.* at *2. The court disagreed, finding that even if a viable analogous federal common law claim existed (a question it did not resolve), the defendants' "creative argument [was] inconsistent with the well-pleaded complaint rule and longstanding controlling authority." *Id.* at *5. After a thorough discussion of controlling circuit precedent and persuasive decisions, the court "reject[ed] Defendants' request for displacement of

the well-pleaded state law claims in Plaintiff's complaint by federal common law," held that "removal is not proper on this basis," and granted remand. *Id.* at *7, *11.

The clearest evidence that Defendants do not have a "strong argument on which [they] could win" on appeal, *Leiva-Perez*, 640 F.3d at 968, is that the same arguments have been presented in courts around the country and have never won.[3] The Court should deny the requested stay.

B. Defendants Will Not Suffer Irreparable Harm Absent a Stay.

Defendants' irreparable harm arguments are insubstantial. They argue that proceeding in state court under state procedural rules would injure them. Plus it would cost money, and they might have to spend more money if the case returns from state to federal court. But "as important as it is to make correct decisions about matters of federal jurisdiction and even removal procedure, trial in state court is not a horrible fate," 15A Wright & Miller, FED. PRAC. & P. § 3914.11 (2d ed.), and "[m]ere litigation expense, even substantial and unrecoupable cost, does not

[3] Defendants' continued reliance on *City of New York v. B.P. p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) remains inapposite. That decision granted the defendants' motion to dismiss for failure to state a claim in a case initiated in federal court in the first instance. The court did not determine any question of federal subject-matter jurisdiction, let alone removal jurisdiction. In any case, the district court in *City of New York* relied principally and uncritically on the district court's reasoning and decision in *Oakland*, which has been reversed. *See, e.g.*, *id.* at 472 (citing and quoting *Oakland* district court decision for proposition that "the City's claims are ultimately based on the 'transboundary' emission of greenhouse gases, indicating that these claims arise under federal common law and require a uniform standard of decision").

constitute irreparable injury," *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). Spending money and litigating in state court are firmly within the category of everyday irritants that do not constitute irreparable harm.

Defendants' appeal of the Remand Order under 28 U.S.C. § 1447(d) would not become "hollow" without a stay. *See* Stay Motion at 18. Nothing that occurs in state court after remand could moot or even affect Defendants' appeal. The cases on which Defendants primarily rely arose in a materially different context, where the moving parties sought to stay orders to disclose sensitive documents that would be impossible to effectively claw back if released, thereby mooting any meaningful appeal from the trial courts' disclosure orders. *See Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) (once surrendered, "confidentiality will be lost for all time"); *Hiken v. Dep't of Def.*, No. C 06-02812 JW, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (disclosure of information with "important national security implications" would moot appeal). There are no analogous considerations here.

The only Ninth Circuit case Defendants cite, *Golden Gate Restaurant Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1125 (9th Cir. 2008), is inapposite. There, the court identified the irreparable and "otherwise avoidable financial costs" to San Francisco citizens who would have lost healthcare coverage

had the court not stayed its ruling—a far cry from "mere litigation expense," which in any event is not irreparable harm. *See Renegotiation Bd.*, 415 U.S. at 24.[4]

The mere fact that litigation may proceed in the absence of a stay is insufficient to demonstrate irreparable harm. Even if an erroneous remand created some form of cognizable injury, it is not the kind of serious injury that warrants the Court's intervention. Defendants' own arguments prove the point: they state that considerations of costs and inconsistent results "have led a number of courts wrestling with these climate-change nuisance suits to stay proceedings pending clarity from the Supreme Court" in the *Baltimore* case. Stay Motion at 19. The reason they provide no citations to those stay orders is that at least two of them, in the Rhode Island and Baltimore litigation, were entered *by state trial court judges after remand*. In fact, in both cases the federal district courts, circuit courts, and Supreme Court *denied* stays pending remand, but the defendants were successful in moving the state court to reserve ruling on motions to dismiss pending resolution of

[4] *Northrop Grumman Technical Services, Inc. v. DynCorp International LLC*, No. 1:16CV534 (JCC.IDD), 2016 WL 3346349 (E.D. Va. June 16, 2016), provides no support for a stay. The Eastern District of Virginia there emphasized that the defendants' federal officer issues raised "novel" issues of "first impression," including "complex questions and novel legal theories which the Fourth Circuit has yet to evaluate." *Id.* at *3. Moreover, the state court had scheduled trial a mere five weeks after the stay order. *Id.* at *4. Here, of course, all Defendants' removal arguments are meritless, and there are no trial dates or even any scheduling order in either this Court or the state court. On remand, the case would simply proceed to motions to dismiss (which the state courts are as competent to hear as federal courts) and discovery (which would occur in either forum).

the defendants' remand appeals, and unrelated appeals in cases concerning personal jurisdiction. *See* Sher Decl. Ex. 3, Order Deferring Defendants' Joint Motion for Protective Order and Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, *Mayor & City Council of Baltimore v. BP P.L.C.*, Case No. 24-C-18-004219 (Md. Cir. Ct. Aug. 6, 2020); Order Delaying Further Proceedings on Defendants' Joint Motion to Dismiss, *State of Rhode Island v. Chevron Corp.*, C.A. No. PC-2018-4716, 2020 WL 4812764 (R.I. Super. Ct. Aug. 13, 2020). There are no procedural or substantive rights Defendants might lose if this case is remanded.

Lastly, despite Defendants' ominous invocation of comity and federalism, *see* Stay Motion at 2, 20, the procedure when a case is removed after substantive proceedings in state court is not mysterious: "All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." 28 U.S.C. § 1450. Thus, "once a case has been removed to federal court, it is settled that federal rather than state law governs the future course of proceedings, notwithstanding state court orders issued prior to removal," and "Section 1450 implies as much by recognizing the district court's authority to dissolve or modify injunctions, orders, and all other proceedings had in state court prior to removal," the same way *Granny Goose Foods,*

Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty., 415 U.S. 423, 437 (1974).

These circumstances arise routinely where, for example, the defendant discovers a basis for removal after conducting some discovery, or where a plaintiff voluntarily amends its complaint in a way that creates federal jurisdiction: "if the case stated by the initial pleading is not removable," the defendant may still remove "within thirty days after receipt . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3); *see also, e.g.*, *Nikollaj v. Fed. Ins. Co.*, 472 F. Supp. 3d 1138, 1140 (M.D. Fla. 2020) (denying motion to remand where discovery responses first showed diversity jurisdiction was satisfied). Not only is there no irreparable harm in litigating in state court before removal, it is expressly contemplated in the United States Code. *See also Broadway Grill, Inc. v. Visa Inc.*, No. 16-CV-04040-PJH, 2016 WL 6069234, at *2 (N.D. Cal. Oct. 17, 2016) (denying stay of remand pending appeal) ("[I]f the case proceeds in state court but then ultimately returns to federal court, the interim proceedings in state court may well help advance the resolution of the case.").

Defendants have not demonstrated irreparable harm, and that reason alone is sufficient to deny Defendants' Stay Motion. *See Leiva-Perez*, 640 F.3d at 965.

C. Issuance of a Stay Will Substantially Injure Plaintiffs and Is Not in the Public Interest.

A stay would prevent Plaintiffs from seeking prompt redress of their claims, to their detriment and the detriment of their residents. Plaintiff City and County of Honolulu filed its complaint nearly a year ago on March 9, 2020, and there have been no substantive developments since then. No motions to dismiss or responsive pleadings have been filed, no discovery has been propounded, and there is no litigation schedule. Defendants argue that a stay would avoid costly and potentially duplicative litigation, but it is their newly pending appeal that "may be a fruitless exercise, costing the parties time and money that could otherwise be spent litigating the merits." *See SFA Grp., LLC v. Certain Underwriters at Lloyd's London*, No. CV 16-4202-GHK(JCX), 2017 WL 7661481, at *2 (C.D. Cal. Jan. 6, 2017).

The public interest does not support Defendants' continued interference with state court proceedings, either. *See Maui Land & Pineapple Co. v. Occidental Chem. Corp.*, 24 F. Supp. 2d 1083 (D. Haw. 1998) (denying motion to stay remand order pending appeal because, in part, "the public interest at stake in this case is the interference with state court proceedings"); *see also Browning v. Navarro*, 743 F.2d 1069, 1079 n.26 (5th Cir. 1984) (declining to stay remand pending appeal "out of respect for the state court and in recognition of principles of comity").

Because Defendants have not demonstrated a strong likelihood of success on the merits, they must show both that their appeal raises serious legal questions and

that the balance of hardships "tips sharply" in their favor. *See Leiva-Perez*, 640 F.3d at 971. Defendants have made none of those showings.

D. Multiple Courts Have Denied Defendants' Motions for Stays Pending Appeal in Analogous Cases.

As already noted, multiple district courts have denied motions to stay pending appeal in analogous cases to which many Defendants here are parties.

In *Baltimore*, the court found that a stay was not warranted because any appellate review would be limited to federal officer removal, and defendants did not demonstrate "a substantial likelihood of success on the merits of th[at] issue" because "[t]hey merely recite[d] the same arguments outlined in their Notice of Removal and opposition to the City's Remand Motion." 2019 WL 3464667, at *4. Even if the remand order were reviewable in its entirety, the court found that a stay still was not warranted because the defendants also failed to show that the remaining three factors supported a stay. *Id*. at *5.

The court rejected defendants' arguments that "an immediate remand would render their appeal meaningless and would undermine the right to a federal forum provided by the federal officer removal statute." *Id*. (citations omitted). The court held that "defendants' appeal would only be rendered moot in the unlikely event that a final judgment is reached in state court before resolution of their appeal"—a "speculative harm [that] does not constitute an irreparable injury." *Id*. It further

found that defendants had not "shown that the cost of proceeding with litigation in state court would cause them to suffer irreparable injury." *Id*.

The court also rejected defendants' arguments that a stay "would avoid costly, potentially wasteful litigation in state court" and that it "would delay proceedings in state court 'only briefly' and, thus, would not prejudice the City." *Baltimore*, 2019 WL 3464667, at *6. Instead, the court held that denial of the stay was warranted because

> [t]his case is in its earliest stages and a stay pending appeal would further delay litigation on the merits of the City's claims. This favors denial of a stay, particularly given the seriousness of the City's allegations and the amount of damages at stake.

Id. The court denied the motion.

The district court in *Rhode Island* also denied the defendants' motion to stay there without discussion, as did the First Circuit and Supreme Court. *See* Sher Decl. Ex. 4, Text Order, *State of Rhode Island v. Shell Oil Prods. Co.*, No. 1:18-cv-395-WES-LDA (D.R.I. Sept. 10, 2019) ("The Court DENIES Defendants' Motion to Stay Remand Order Pending Appeal."); Sher Decl. Ex. 5, Order of Court, *State of Rhode Island v. Shell Oil Prods. Co.*, No. 19-1818 (1st Cir. Oct. 7, 2019) ("Defendants-appellants request a stay pending appeal of the district court's . . . Order remanding the underlying action to Rhode Island state court. The motion is denied."); *BP p.l.c. v. Rhode Island*, No. 19A391 (U.S. Oct. 22, 2019) ("Application [for a stay pending appeal] denied by Justice Breyer.").

V. CONCLUSION

Defendants' Motion to Stay the Remand Order Pending Appeal should be denied.

DATED: February 26, 2021 By: */s/ Victor M. Sher*

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