UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

CITY OF ANNAPOLIS, MARYLAND, Plaintiff, v. BP P.L.C., *et al.*, Defendants.	CASE NO.: 21-cv-00772 ELH

DEFENDANTS' MOTION TO STAY PROCEEDINGS

Defendants move for an order staying proceedings in this case, pending the Supreme Court's decision in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S.). In support of their Motion to Stay Proceedings, Defendants rely upon and incorporate by reference their supporting Memorandum of Law.

DATED: April 7, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April 2021, the foregoing document was filed through the ECF system and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

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UNITED STATES DISTRICT COURT
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CITY OF ANNAPOLIS, MARYLAND,

Plaintiff,

v.

BP P.L.C., *et al.*,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY PROCEEDINGS

I. INTRODUCTION AND BACKGROUND[1]

Plaintiff, the City of Annapolis, filed this action against a select group of Defendants in the energy industry in the Circuit Court for Anne Arundel County seeking to use state law to impose tort liability for past and future harms allegedly attributable to global climate change. Defendants removed the case to this Court on five independent grounds. *See* Dkt. 1. Although Plaintiff intends to file a motion to remand, Defendants respectfully submit that any further briefing or action on that motion should be stayed at least until the Supreme Court has issued a decision in another substantially similar climate change related action from this District: *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S.).

As the Court is aware, the *Baltimore* action is like this one in many respects, and could provide the opportunity for the Supreme Court or the Fourth Circuit to decide whether federal jurisdiction lies over claims like these alleging harms from global climate change. In *Baltimore*, the Mayor and City Council of Baltimore—represented by the same private law firm as Plaintiff here—sued 26 energy companies under Maryland state law, alleging that the defendants' products "are directly responsible for . . . approximately 15 percent of total emissions of" CO_2 between 1965 and 2015, and are therefore liable for harms such as "rising atmospheric and ocean temperatures, ocean acidification, melting polar ice caps and glaciers, more extreme and volatile weather, and sea level rise." *Mayor & City Council of Baltimore v. BP p.l.c.*, No. 1:18-cv-2357 (D. Md.), Dkt. 42 ¶¶ 1, 7. Plaintiff here makes substantially similar allegations in its Complaint. *See, e.g.*, Dkt. 2, Ex. 1 ¶¶ 9, 22–23, 57. The *Baltimore* Defendants, many of which are also defendants here, removed on a number of the same grounds asserted in this action.

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

This Court granted the plaintiff's motion to remand the *Baltimore* action, and the Fourth Circuit affirmed. In affirming, however, the Fourth Circuit reviewed only *one* of the defendants' grounds for removal—removal under the federal officer removal statute. It did not consider the other grounds for removal, which are similar to those asserted here, including federal common law, *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005) ("*Grable*"), the Outer Continental Shelf Lands Act ("OCSLA"), and federal enclave jurisdiction. The Fourth Circuit (and this Court) also did not consider in *Baltimore* the expanded evidentiary record that Defendants provide in support of removal in this case.

The Fourth Circuit refused to consider the other grounds for removal finding that 28 U.S.C. § 1447(d) precludes review of any other grounds except those pursuant to section 1442 (federal officer removal) or section 1443 (civil rights). *Mayor & City Council of Baltimore v. BP p.l.c.*, 952 F.3d 452, 459 (4th Cir. 2020). The Fourth Circuit then reasoned (incorrectly) that 28 U.S.C. § 1447(d) limited its appellate jurisdiction to these specified "ground[s] alone . . . and does not extend to the seven other grounds for removal raised by Defendants, even though the district court rejected them in the same remand order." *Id.*

On October 2, 2020, the Supreme Court granted certiorari to consider whether the Fourth Circuit erred in holding that it lacked appellate jurisdiction to consider any of the other removal grounds. The case was argued on January 19, 2021. Defendants expect that *the Supreme Court will issue a decision by June 2021*.

Staying remand briefing pending the Supreme Court's decision in *Baltimore* will promote judicial efficiency by avoiding duplicative and unnecessary litigation in this Court. If the Supreme Court agrees with petitioners that the Fourth Circuit had jurisdiction to review the entire remand order, it has the option either to address the question of whether federal jurisdiction exists on other

grounds and reverse the judgment below, or to vacate the judgment and direct the court of appeals to address those other grounds in the first instance. If the Supreme Court concludes that federal jurisdiction exists, there will be no need for the parties to brief (and this Court to decide) that issue here. In particular, petitioners have argued, and the Supreme Court could conclude, claims based on global climate change arise under federal common law for purposes of federal-question jurisdiction and are thus removable under 28 U.S.C. § 1331. Indeed, at oral argument in January, the United States argued 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. And the Second Circuit recently concluded in a similar climate change related case that claims like the ones Plaintiff raises here "must be brought under federal common law." *City of New York v. Chevron Corp.*, 2021 WL 1216541, at *9 (2d Cir. Apr. 1, 2021); *see id.* at *1 ("The question before us is whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions. Given the nature of the harm and the existence of a complex web of federal and international environmental law regulating such emissions, we hold that the answer is 'no.'").[2]

[2] To be sure, because the plaintiff in *City of New York* filed its complaint in federal court, that case did not present the question of whether removal was proper. *See id.* at *8. But the Second Circuit's rationale in disposing of the plaintiff's claims *on the merits* on the ground that they necessarily arise under federal law clearly supports removal—and the Supreme Court could consider this issue by the end of June.

If the Supreme Court instead vacates the judgment below and directs the Fourth Circuit to consider the additional grounds for removal, the Fourth Circuit's decision on remand could resolve or at least shed light on the removal issues presented in this case (although, as noted above, this case also involves additional factual support for federal officer removal). For instance, if the Fourth Circuit determines removal was proper under one of the grounds it did not initially consider—for example, under federal common law, *Grable*, OCSLA, or federal enclave jurisdiction—there may be no doubt that removal was also proper in this case, obviating any need for the parties to brief (or the Court to rule) on removal and remand issues. Even if *Baltimore* does not completely resolve the question of federal jurisdiction here, it will likely narrow and focus the issues before this Court.

It makes little sense to brief the issues of remand and removal and for the Court to consider that briefing now—before the Supreme Court and potentially the Fourth Circuit address the same issues. At best, the parties would need to file supplemental briefs to address the Supreme Court and Fourth Circuit decisions. At worst, this action might be erroneously remanded to state court in violation of Defendants' right to a federal forum. Moreover, because the Supreme Court's decision will likely be issued by June 2021, Plaintiff cannot plausibly claim any meaningful harm from such a brief stay, whereas a premature and potentially erroneous remand could substantially prejudice Defendants.

II. LEGAL STANDARD

District courts have the inherent power to stay proceedings pending before them. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). "When considering a discretionary motion to stay, courts typically examine three factors: (1) the impact on the orderly course of justice, sometimes referred to as judicial economy, measured in terms of the simplifying or complicating

of issues, proof, and questions of law which could be expected from a stay; (2) the hardship to the moving party if the case is not stayed; and (3) the potential damage or prejudice to the non-moving party if a stay is granted." *Int'l Refugee Assistance Project v. Trump*, 323 F. Supp. 3d 726, 731 (D. Md. 2018). "A district court has broad discretion to stay proceedings as part of its inherent power to control its own docket." *Navigators Specialty Ins. Co. v. Med. Benefits Adm'rs of MD, Inc.*, 2014 WL 1918710, at *1 (D. Md. May 12, 2014) (citing *Landis*, 299 U.S. at 254). "Such discretion requires a court to 'weigh competing interests and maintain an even balance.'" *Freight Drivers & Helpers Loc. Union No. 557 Pension Funds v. Penske Logistics LLC*, 2015 WL 4069309, at *1 (D. Md. July 2, 2015) (quoting *Landis*, 299 U.S. at 254–55).

III. ARGUMENT

A. A Stay Will Conserve Judicial Resources And Promote Judicial Economy.

"When assessing judicial resources, a court should determine whether a stay would avoid the 'needless duplication of work and the possibility of inconsistent rulings.'" *Commonwealth of Virginia ex rel. Integra Rec LLC v. Countrywide Securities Corp.*, 2015 WL 222312, at *4 (E.D. Va. Jan. 14, 2015) (citation omitted); *see also Yearwood v. Johnson & Johnson, Inc.*, 2012 WL 2520865, at *4 (D. Md. June 27, 2012). Here, given the substantial overlap between this case and *Baltimore*, a stay would indisputably conserve judicial resources.

The Complaint here is substantially similar to the *Baltimore* complaint and Defendants' grounds for removal here were all asserted in *Baltimore* (although Defendants have provided additional factual support for removal in this case that was not presented in *Baltimore*). *Compare* Dkt. 2, Ex. 1, *with Mayor & City Council of Baltimore*, No. 18-cv-2357, Dkt. 2, Ex. A. As a result, the Supreme Court's decision in *Baltimore* could be dispositive here—for example, if the Supreme Court agrees with petitioners' argument that the plaintiff's claims necessarily arise under federal

law. Such a ruling would completely obviate the need for the parties to brief the propriety of removal here and for this Court to decide these issues.

Even if *Baltimore* does not fully resolve this Court's jurisdiction, the substantial overlap in legal issues provides sufficient grounds for a stay. *See Stone v. Trump*, 356 F. Supp. 3d 505, 518 (D. Md. 2018) (finding that a "stay would promote judicial economy" due to the "significant overlap" between the issues presented below and on appeal); *Gross v. Pliva USA, Inc.*, 2011 WL 13223899, at *1 (D. Md. Apr. 7, 2011) (staying proceedings where "regardless of which way the Supreme Court comes down, its opinion" in a pending case would "provide guidance as to the . . . arguments available to the Parties" and to the legal issues at play); *United States v. McClelland*, 2020 WL 901821, at *2 (W.D.N.C. Feb. 25, 2020) (ordering a stay to "conserv[e] the Court's resources" because of the "substantial overlap between the legal issues present here and those that the Fourth Circuit may itself soon decide"). Among other things, the Supreme Court's resolution of *Baltimore* could narrow the issues before this Court and guide the parties and the Court in deciding the threshold question of federal jurisdiction. Put simply, the *Baltimore* action "will guide the future of this litigation before this Court," and "narrow the issues" related to removal. *Wilt v. Household Life Ins. Co.*, 2015 WL 5501751, at *2 (S.D. W.Va. Sept. 16, 2015). Indeed, if the Supreme Court were to overturn the Fourth Circuit's refusal to address the other grounds for removal and direct the Fourth Circuit to resolve those issues, the Fourth Circuit's decision on remand could affirm the propriety of removal on other grounds, or at least provide additional guidance regarding the legal standards applicable to the removal grounds at issue here.

B. Plaintiff Will Not Be Prejudiced By A Stay.

In considering prejudice to the non-moving party, "courts have evaluated the progress of the case, the presence of pending motions, [and] the length of delay proposed." *Virginia ex rel.*

Integra Rec, 2015 WL 222312, at *4. These considerations weigh decisively in favor of a stay here.

This case is still in its very early stages. Plaintiff filed this action on February 22, 2021 (*see* Dkt. 2, Ex. 1), and Defendants removed it on March 25, 2021 (*see* Dkt. 1). The parties have not yet commenced discovery or filed dispositive motions; in fact, the only substantive filing to date is Defendants' notice of removal. Where a case "is still in the very early stages of litigation, there is little prejudice to either side if the Court stays the case." *American Tech. Servs., Inc. v. Universal Travel Plan, Inc.*, 2005 WL 2218437, at *3 (E.D. Va. Aug. 8, 2005). On the contrary, "preventing further, and potentially futile, expenditures of time and resources by the parties and the Court weighs *in favor* of granting [a stay] at this stage of the litigation." *NAS Nalle Automation Sys., LLC v. DJS Sys., Inc.*, 2011 WL 13141594, at *1 (D.S.C. Nov. 23, 2011) (emphasis added). It is therefore no surprise that courts routinely grant stays at such an early juncture. *See, e.g.*, *Mitchell v. Lonza Walkersville*, Inc., 2013 WL 3776951, at *3 (D. Md. July 17, 2013) (granting stay of proceedings where "discovery has not commenced" and "a trial date has not been set"); *Exopack-Tech., LLC v. Graphic Packaging Holding Co.*, 2012 WL 13008353, at *1 (D.S.C. Feb. 29, 2012) ("Here, the litigation is in its early stages. Graphic has yet to file an answer, no discovery has taken place, and the court has not yet . . . set a trial date."); *Virginia ex rel. Integra Rec*, 2015 WL 222312, at *5 ("[T]he Commonwealth can claim little prejudice" where the action has "only just commenced[,] [n]o answers have been filed, no discovery has begun, and no trial date has been set.").

At the same time, the length of the requested stay will be for a definite—and short—period of time. The Supreme Court heard argument in *Baltimore* on January 19, 2021. The case is likely to be decided by June 2021. Under these circumstances, a brief stay is appropriate and warranted.

As another court in this Circuit explained in granting a stay for the Supreme Court to rule on a threshold issue: "[T]he Supreme Court's decision is anticipated by June or July of this year. In short, it is prudent to put this litigation on hold for a few months in order to benefit from any pertinent wisdom the Supreme Court may offer regarding the plaintiff's standing here." *Mey v. Got Warranty, Inc.*, 2016 WL 1122092, at *3 (N.D. W.Va. Mar. 22, 2016); *see also Gross*, 2011 WL 13223899, at *2 (noting that "[t]he probable delay is merely a few months" as it is "the usual practice" of the Supreme Court to "issue its opinions in June or July of the term in which it hears oral argument"); *Divine Fish House, Inc. v. BP, P.L.C.*, 2010 WL 2802505, at *2 (D.S.C. July 14, 2010) ("A delay of a few months . . . is, nonetheless, slight when compared to the hardship to the defendants and the interests of judicial economy."); *Litchfield Co., LLC v. BP, P.L.C.*, 2010 WL 2802498, at *2 (D.S.C. July 14, 2010) ("The Court finds that the prejudice to the plaintiff caused by a delay of months is outweighed by the hardship to the defendants and the interests of judicial economy.").[3]

In short, a brief stay will not injure Plaintiff, but will instead conserve the parties' resources and promote judicial economy and the public interest by avoiding potentially duplicative briefing on issues that are set to be decided by the Supreme Court in less than three months.

C. Defendants Face Serious Hardship In The Absence Of A Stay.

In contrast, Defendants face substantial hardship if proceedings in this case move forward now. Defendants will be required to litigate remand issues in this Court without the aid of guidance from the Supreme Court and the Fourth Circuit—an exercise that may turn out to have been

[3] In the event that the Supreme Court vacates the Fourth Circuit's decision in *Baltimore* and returns the case to that court to consider the other removal grounds, Defendants anticipate that they would ask this Court to extend the stay pending the Fourth Circuit's decision. This would extend the stay somewhat although Defendants anticipate that the Fourth Circuit would rule reasonably promptly.

entirely unnecessary if either court concludes that there is federal jurisdiction over actions alleging harms from global climate change. And worse, if this Court grants Plaintiff's motion to remand, proceedings in Maryland state court could immediately resume. *See* 28 U.S.C. § 1447(c) ("A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case."). As a result, absent a stay, the parties may be forced to proceed simultaneously along at least two tracks: (1) an appeal to the Fourth Circuit of the entire remand order and (2) proceedings in state court.

This poses a particularly profound risk to Defendants because, if jurisdiction is ultimately resolved on appeal in favor of federal jurisdiction, Defendants will have been denied their right to a federal forum. During this time, the parties will likely have undergone meaningful litigation in state court—including substantive motions practice and possibly some discovery—which this Court would then have to untangle. Courts routinely find irreparable harm where, as here, there is a substantial "risk of [the] inefficient use of the parties' time and resources," *Pagliara v. Federal Home Loan Mortgage Corp.*, 2016 WL 2343921, at *3 (E.D. Va. May 4, 2016), and where the parties may incur "wasteful, unrecoverable, and possibly duplicative costs," *Ewing Indus. Co. v. Bob Wines Nursery, Inc.*, 2015 WL 12979096, at *3 (M.D. Fla. Feb. 5, 2015). Finally, on top of the harm to the parties, failing to stay further proceedings risks harm to the judicial process more generally—including the risk of inconsistent rulings if this Court enters a remand order that ultimately proves irreconcilable with the disposition in *Baltimore*.

IV. CONCLUSION

For the foregoing reasons, the Court should stay further proceedings in this case at least until the Supreme Court issues its decision in *Baltimore*.

Dated: April 7, 2021

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