UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

CITY OF ANNAPOLIS, MARYLAND, Plaintiff, vs. BP P.L.C.; *et al.*, Defendants.	Case Number: 21-cv-00772-ELH

PLAINTIFF CITY OF ANNAPOLIS'S OPPOSITION TO DEFENDANTS' MOTION TO STAY PENDING APPEAL

"Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Exparte McCardle*, 74 U.S. 506, 514 (1869). Jurisdiction is a threshold inquiry. In its baseless Notice of Removal, Defendants assert that this Court has jurisdiction. However, Defendants' Motion for Stay ("Motion") subject would prevent this Court from expeditiously determining jurisdiction. This Motion is a bald attempt to delay, with no benefit to the parties or the Court. It is wholly frivolous, an assault on judicial economy, and lacks a good faith basis in law, equity, and fact. No pending litigation will affect the merits of Defendants' removal here one way or the other. Only through the City of Annapolis's anticipated Motion for Remand can this Court determine its jurisdiction. This Court must deny Defendants' Motion and allow the City to file its Motion for Remand.

I. INTRODUCTION

For more than 130 years, Congress has prohibited nearly all appellate review of district court remand orders, with narrow exceptions to review whether removal was proper under the federal officer removal statute, 28 U.S.C. § 1442, and the civil rights removal statute, 28 U.S.C.

§ 1443. *See* 28 U.S.C. § 1447(d). This Court previously determined that it lacked subject-matter jurisdiction under the federal officer removal statute, and seven other theories for removal, in a factually analogous suit. *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) ("*Baltimore I*"). Consistent with the limited appellate jurisdiction conferred by Congress, the Fourth Circuit reviewed this Court's decision as to federal officer removal only, and affirmed. *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*").

With no intervening change in law or facts, Defendants removed this case from the Circuit Court for Anne Arundel County asserting five of the same well-worn and fruitless jurisdictional theories that seven different district courts—including this Court in *Baltimore I*—have rejected. Removal was improper, and the City must be allowed to file its Motion for Remand without any further delay or waste of federal judicial resources. While Defendants' inapposite cases and illogical arguments for a stay are addressed point by point below, the City asks this Court to expeditiously deny this dilatory Motion to allow the Court to be briefed on its jurisdiction.

On the merits of their removal jurisdiction arguments and on the equities that could support a stay, Defendants have accumulated "[a] batting average of .000." *City & Cty. of Honolulu v. Sunoco LP*, 2021 WL 839439, at *2 n.3 (D. Haw. Mar. 5, 2021) (denying stay of remand order pending appeal). Of the seven district courts granting motions to remand in analogous cases, four have been affirmed, by the First, Fourth, Ninth, and Tenth Circuits.[1] None have been reversed. The

[1] *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020), *reh'g en banc denied* (Aug. 4, 2020), *cert. petition docketed*, No. 20-884 (U.S. Jan. 4, 2021); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019), *as amended* (June 20, 2019), *aff'd in part, appeal dismissed in part*, 952 F.3d 452 (4th Cir. 2020), *cert. granted*, 141 S. Ct. 222 (2020); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019),

only decision *denying* a motion to remand in an analogous climate-related case has been reversed.[2] In all these cases but one, moreover, the district court, circuit court, and Supreme Court have all denied stays of remand pending appeal.[3]

Defendants nevertheless seek to stay proceedings in this Court indefinitely, pending the United States Supreme Court's decision on an issue of appellate jurisdiction that has no bearing on the City of Annapolis's anticipated motion to remand—and "potentially the Fourth Circuit['s]" consideration of the same jurisdictional issues rejected by this Court and every other. Mot. at 5. The City believes Defendants' removal here lacked an objectively reasonable basis in light of the recent binding Fourth Circuit authority in *Baltimore II*, and intends to seek costs and attorneys' fees incurred by reason of the removal. *See* 28 U.S.C. § 1447(c). The Defendants' proposed stay

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aff'd in part, appeal dismissed in part, 965 F.3d 792 (10th Cir. 2020), *cert. petition docketed* No. 20-783 (U.S. Dec. 8, 2020); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019), *aff'd in part, appeal dismissed in part*, 979 F.3d 50 (1st Cir. 2020), *cert petition docketed*, No. 20-900 (U.S. Jan. 5, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020); *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW, 2021 WL 531237 (D. Haw. Feb. 12, 2021), *appeals filed*, Nos. 21-15313 & 21-15318 (9th Cir. Feb. 23, 2021); *State of Minnesota v. Am. Petroleum Institute*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021), *appeal filed*, No. 21-1752 (8th Cir. Apr. 5, 2021).

[2] *City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020), *opinion amended and superseded on denial of reh'g sub nom.*, 969 F.3d 895 (9th Cir. 2020), *cert. petition docketed*, No. 20-1089 (U.S. Feb. 9, 2021).

[3] *Mayor & City Council of Baltimore v. BP P.L.C.*, 2019 WL 3464667, at *6 (D. Md. July 31, 2019) (Hollander, J.) (denying stay of remand order pending appeal); Declaration of Martin D. Quiñones at Ex. 1, Order, *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 19-1644 (4th Cir. Oct. 1, 2019) (same); *BP P.L.C. v. Mayor & City Council of Baltimore*, 140 S. Ct. 449 (2019) (same); Quiñones Decl. at Ex. 2, *State of Rhode Island v. Shell Oil Prods. Co.*, No. 1:18-cv-395-WES-LDA (D.R.I. Sept. 10, 2019) (same); Quiñones Decl. at Ex. 3, Order of Court, *State of Rhode Island v. Shell Oil Prods. Co.*, No. 19-1818 (1st Cir. Oct. 7, 2019) (same); *BP p.l.c. v. Rhode Island*, No. 19A391 (U.S. Oct. 22, 2019) (same); *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 423 F. Supp. 3d 1066 (D. Colo. 2019) (same); *City & County of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW, 2021 WL 531237 (D. Haw. Feb. 12, 2021) (same); *City & Cty. of Honolulu v. Sunoco LP*, No. 21-15313, 2021 WL 1017392 (9th Cir. Mar. 13, 2021) (same).

would only reward their already dilatory removal tactics and delay this Court's determination of jurisdiction, preventing the City's from moving for remand, and straining judicial economy to pursue frivolous legal positions. This Court must guard against Defendants' misuse of this Court's precious resources.

The sole basis for Defendants' Motion is the Supreme Court's pending decision in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189, __ S. Ct. __, 2020 WL 5847132 (U.S. Oct. 2, 2020). But the only question before the Supreme Court concerns the scope of appellate jurisdiction over remand orders pursuant to 28 U.S.C. § 1447(d). The *Baltimore* defendants have not challenged the merits of this Court's holding, affirmed by the Fourth Circuit, that removal based on the federal officer removal statute was improper. The Supreme Court's decision will have no bearing on the merits of the City's motion to remand or the City's claims, even if it reverses the Fourth Circuit with respect to the scope of review. Defendants' arguments rest on a series of hypotheticals that the Supreme Court will reverse the Fourth Circuit's appellate jurisdiction decision, and then either the Supreme Court or the Fourth Circuit will bless one of Defendants' alternative removal arguments that have been rejected by every court to consider them, including this one. Defendants' conjecture that they will prevail on issues they have now lost nearly a dozen times is no basis for delay.

Moreover, a stay would work substantial harm to the City and its residents. The City alleges that Defendants have known for decades about the direct link between fossil fuel use and climate change, yet engaged in a coordinated effort to conceal that knowledge from the public. The devastating consequences of Defendants' actions continue to play out in real time. A stay would needlessly delay the resolution of a case of enormous importance to the City just to await a decision that can have no direct bearing on any question this Court will consider. On the other side of the

scale, Defendants would suffer no hardship from moving ahead with the City's motion to remand. Accordingly, Defendants cannot satisfy their burden of establishing a need for a stay and this Court should deny their Motion.

II. BACKGROUND

A. The City of Annapolis's Case

The City filed this lawsuit on February 22, 2021. Complaint, Dkt. 2, Ex. 1. The City asserts Defendants knew the precise, catastrophic risks of their fossil fuel products for decades and actively engaged in a coordinated campaign of deception to conceal and deny this knowledge, all while continuing to promote their fossil fuel products. *Id.* ¶¶ 1–15.

Defendants removed the action to this Court on March 25, 2021. *See* Notice of Removal, Dkt. 1. The City is ready to proceed with briefing the motion to remand, but Defendants' motion asks the Court to stay that briefing because of *Baltimore*. A decision in *Baltimore* at some unspecified point in the future will not relieve this Court of its obligation to assess its own subject-matter jurisdiction, regardless of when the Supreme Court rules and regardless of any potential proceedings that follow in that case. Moreover, as discussed below, that decision will not address Fourth Circuit precedent on the purported bases of subject-matter jurisdiction at issue in the instant Motion to Remand. Delaying proceedings here to wait for *Baltimore* is unwarranted and unnecessary.

B. The Mayor and City Council of Baltimore's Case

In *Baltimore*, the plaintiff Mayor and City Council of Baltimore filed suit against many of the same defendants named here, asserting nuisance, trespass, and product defect claims under Maryland law to recover costs for the climate impacts the defendants foresaw and caused in the City of Baltimore. *Baltimore I*, 388 F. Supp. 3d at 548 (D. Md. 2019). The defendants in *Baltimore*,

like here, wrongfully removed that case. *Id.* and 548–49. The plaintiff filed a motion to remand, and this Court granted the motion. *Id.*

The defendants appealed the remand order and moved to stay the action pending appeal. This 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) ("*Baltimore* Stay Denial"), as did the Fourth Circuit, *see* Quiñones Decl., Ex. 1: Order, *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 19-1644 (4th Cir. Oct. 1, 2019). Defendants then sought a stay for the third time, this time filing an application with the Supreme Court. The Court denied that application. *BP P.L.C. v. Mayor & City Council of Baltimore*, 140 S. Ct. 449 (2019).

On the merits, the Fourth Circuit ultimately affirmed the district court's order granting remand. *Baltimore II*, 952 F.3d 452. The Fourth Circuit affirmed this Court's rejection of federal officer removal, and found that it lacked jurisdiction to consider other issues, consistent with the rule in virtually every other Circuit concerning the scope of review of remand orders. *See* Section III.D, *infra*. The mandate issued on March 30, 2020. *See* Declaration of Joshua Griffith in Support of Motion to Stay, Ex. 2.

The *Baltimore* defendants filed a petition for writ of certiorari, challenging just one issue in the Fourth Circuit's affirmance of the District of Maryland's remand order: whether 28 U.S.C. § 1447(d) limits the Courts of Appeals' jurisdiction on appeal from a remand order to considering the bases for removal expressly enumerated in the statute (federal officer jurisdiction under 28 U.S.C. § 1442 and civil rights jurisdiction under 28 U.S.C. § 1443), or instead extends jurisdiction to every issue encompassed in the remand order any time a defendant has cited one of those bases in its notice of removal. *See* Petition for a Writ of Certiorari, Griffith Decl. Ex. 3 at I. The question

presented in Defendants' petition in *Baltimore* is limited expressly to the scope of review and does not address any the merits of Defendants' rejected bases for removal. *Id.* Ex. 3 at I.[4]

II. LEGAL STANDARD

The proponent of a discretionary stay always "bears the burden of establishing its need," *Clinton v. Jones*, 520 U.S. 681, 708 (1997), and "must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). Courts generally consider the following factors when deciding whether to stay proceedings: "(1) the potential prejudice to the non-moving party; (2) the hardship and inequity to the moving party if the action is not stayed; and (3) the judicial resources that would be saved by avoiding duplicative litigation if the case is in fact stayed." *Mitchell v. Lonza Walkersville, Inc.*, No. RDB-12-3787, 2013 WL 3776951, at *2 (D. Md. July 17, 2013) (citing *Yearwood v. Johnson & Johnson, Inc.*, No. RDB-12-1374, 2012 WL 2520865, at *3 (D. Md. June 27, 2012)). *See also Int'l Refugee Assistance Project v. Trump*, 323 F. Supp. 3d 726, 731 (D. Md. 2018). "Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both," and a stay in those circumstances is typically appropriate only where there are "significant" overlapping legal questions between the proceedings, and where the separate proceeding "in all likelihood . . . will settle many and simplify them all." *Landis v. N. Am. Co.*, 299 U.S. 248, 255, 256 (1936) (Cardozo, J.).

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[4] In their merits briefing, the *Baltimore* petitioners briefly argued that removal was proper because the plaintiff's claims "necessarily arise under federal law." This issue is not properly before, and will almost certainly not be decided by, the Supreme Court, because it is not encompassed in the Question Presented in either the petition for certiorari or the merits briefing. Supreme Court Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

III. ARGUMENT

A. The Stay Wastes Judicial Economy Because This Court's Jurisdiction Over This Matter Has Not Been Determined, and is in Serious Doubt.

Remand orders are generally not appealable under the plain terms of 28 U.S.C. § 1447(d). The defendants in *Baltimore* did not challenge the Fourth Circuit's affirmance of this Court's holding that it lacked jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442. Rather, both their petition for certiorari and merits briefing raise only one question for the Court to consider, limited to the scope of § 1447(d)'s exceptions clause:

> 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.

Griffith Decl. Ex. 3 at I & Ex. 4 at I. Even if the Supreme Court finds for the *Baltimore* defendants on that issue and holds that the Fourth Circuit had jurisdiction to review the Defendants' other theories of removal, that outcome cannot resolve the underlying merits question of whether the case was properly removed. The Court will instead almost certainly remand to the Fourth Circuit with instructions to consider the other grounds for removal that this Court, like every other court to consider them, rejected. *See* Section III.D, *infra*. At best, there will be months of additional delay as the parties re-argue the issues not previously resolved by the Fourth Circuit and await a further ruling from that court.

The cases Defendants cite are inapt and lend no legal support for Defendants' Motion for Stay. In two of those cases, district courts stayed discovery pending resolution of legal issues that bore directly on the primary subjects of discovery. In *Stone v. Trump*, 356 F. Supp. 3d 505, 518 (D. Md. 2018), the court stayed an order granting the plaintiff's to compel production of potentially privileged Presidential documents pending a ruling from the Ninth Circuit concerning the very

same documents related to nearly identical claims.[5] And in *Wilt v. Household Life Ins. Co.*, 2015 WL 5501751 (S.D. W.Va. Sept. 16, 2015), the court stayed discovery while it resolved a motion to dismiss and motion to compel arbitration that could have obviated the need for discovery entirely. Two other cases involve stays only long enough for an appellate court to decide federal statutory interpretation questions directly bearing on the matter at hand. *See Gross v. Pliva USA, Inc.*, 2011 WL 13223899, at *1 (D. Md. Apr. 7, 2011) (granting stay where Supreme Court had granted certiorari to resolve "the same claims that Plaintiff brings" were preempted by federal law, which could "require dismissal of the claims against [the defendant], obviating the need for discovery or for the preparation of dispositive motions"); *United States v. McClelland*, 2020 WL 901821 (W.D.N.C. Feb. 25, 2020) (granting stay for Fourth Circuit to decide whether certain crack cocaine possession sentences were eligible for reduction under the First Step Act). Nothing like those circumstances is present here.

Defendants separately urge that this Court and the Fourth Circuit in *Baltimore* did not consider the "expanded evidentiary record" they provided in support of their notice of removal here. Mot. at 3. That argument undermines Defendants' position and suggests that the *Baltimore* decision will *not* control this Court's analysis, since the factual records are supposedly substantially different. Even taken at face value, however, Defendants' supposedly new evidence will not likely alter the outcome. The bulk of Defendants' new evidence is in support of their arguments for federal officer removal, and virtually all of it was recently considered by the District of Hawaii court in the analogous climate-related state law tort case of *City & County of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW, 2021 WL 531237 (D. Haw. Feb. 12, 2021). The

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[5] After eight months without an opinion from the Ninth Circuit, the Maryland District Court amended the stay on reconsideration, finding that the length of the stay had become unreasonable. *See Stone v. Trump*, 402 F. Supp. 3d 153, 161 (D. Md. 2019).

defendants in that case supplemented their original notice of removal with more than 1,000 pages of new material in light of *County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 598 (9th Cir. 2020), in which the Ninth Circuit affirmed an order granting remand in another analogous climate-related state law tort case. The *Honolulu* court reviewed all the "supposedly additional or new arguments" and evidence and still granted remand, finding that none of it distinguished the case from *San Mateo*, but "merely rearranged the deckchairs." *Honolulu*, No. 20-CV-00163-DKW, 2021 WL 531237 at *5. It is unlikely such additional evidence would be persuasive here when it has been rejected elsewhere, even were defendants to present new arguments not presented in *Baltimore*. The actual questions before the Supreme Court in *Baltimore* are not relevant to resolving any issue in this litigation, and *per se* will not address Defendants' "new" evidence.

B. Every Day That Passes Without This Court Determining Its Jurisdiction Substantially Prejudices the City and Wastes Judicial Economy.

The cases Defendants cite where stays were granted early in litigation are all clearly distinguishable. Defendants argue that a stay would avoid costly and potentially duplicative litigation, but their own arguments show that the source of potential prejudice here is continued delay, not speculative future litigation expenses. A stay would prevent the City from seeking prompt redress of its claims, to its detriment and the detriment of its residents. As City residents are acutely aware, Annapolis's infrastructure and population are highly vulnerable to the impacts of sea level rise and other climate change impacts. Each flood season now brings a predictable and devastating inundation of historic properties, private property, and businesses, with associated loss of tax revenue along the city's 17 miles of waterfront land.[6] *See also* Compl. at ¶¶ 10–15, 236–42

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[6] Annapolis has experienced the greatest recorded increase in average annual nuisance flooding events of any city in the nation—nearly tenfold. *See City Dock Flood Mitigation Project*, CITY OF ANNAPOLIS, https://www.annapolis.gov/1416/City-Dock-Flood-Mitigation-Project (last

(detailing the City's injuries from climate change). Time is of the essence for Annapolis because it is acutely vulnerable to sea level rise.

Contrary to Defendants' contentions, the stay contemplated in Defendants' Motion is not at all "brief." Realistically, Defendants' requested stay would be at least six months—longer than the "brief" stays imposed in the cases cited in Defendants' Motion. *Mey v. Got Warranty, Inc*., No. 5:15-CV-101, 2016 WL 1122092, at *3 (N.D.W. Va. Mar. 22, 2016) (two or three months), *Divine Fish House, Inc. v. BP, P.L.C.*, No. 2:10-CV-01461, 2010 WL 2802505, at *1 (D.S.C. July 14, 2010) (less than one month); *Litchfield Co., LLC v. BP, P.L.C*., No. 2:10-CV-01462, 2010 WL 2802498, at *1 (D.S.C. July 14, 2010) (less than one month). If the Supreme Court reverses the Fourth Circuit in *Baltimore* and remands for consideration of the other grounds for removal, there would be rounds of briefing that will realistically last a minimum of three months, followed at an indefinite future time by additional oral argument and a further opinion of the Fourth Circuit. *See* Fed. R. App. P 28(f) (time for filing briefs); Fourth Circuit Internal Operating Procedure 41.2 (concerning reopening appeals after remand from the Supreme Court). The City filed its case in February 2021, and in the event the *Baltimore* defendants prevail in the Supreme Court, Defendants' proposed stay would last six months at a minimum, during which time the parties would not even complete briefing on the City's Motion to Remand, let alone begin dispositive motions or discovery. This is an unwarranted waste of judicial economy.

Defendants cite clearly distinguishable case law where stays were granted early in litigation. In each, parallel proceedings involving the same parties were likely to eliminate the need

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visited Feb. 3, 2021) (citing *NOAA: 'Nuisance flooding' an Increasing Problem as Coastal Sea Levels Rise*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (July 28, 2014), https://www.noaa.gov/media-release/noaa-nuisance-flooding-increasing-problem-as-coastal-sea-levels-rise.

for further litigation entirely, or dramatically reduce the scope of the plaintiff's claims on the merits. *See Am. Tech. Servs., Inc. v. Universal Travel Plan, Inc.*, No. CIV.A.1:05CV802(JCC), 2005 WL 2218437, at *3 (E.D. Va. Aug. 8, 2005) (denying motion to dismiss and staying case so parties could attempt to comply with contractual dispute resolution process); *NAS Nalle Automation Sys., LLC v. DJS Sys., Inc.*, No. CV 6:10-2462-TMC, 2011 WL 13141594, at *2 (D.S.C. Nov. 23, 2011) (granting stay so that the Patent and Trademark Office ("PTO") could "reexamine [and] significantly simplify the underlying issues in this case or perhaps even eliminate any need for further litigation"); *Mitchell v. Lonza Walkersville, Inc.*, No. CIV.A. RDB-12-3787, 2013 WL 3776951, at *2 (D. Md. July 17, 2013) (granting stay while Equal Employment Opportunity Commission reopened investigation of Title VII claim, result of which "may eliminate the need for further litigation"); *Exopack-Tech., LLC v. Graphic Packaging Holding Co.*, No. CV 7:11-337-TMC, 2012 WL 13008353, at *2 (D.S.C. Feb. 29, 2012) (granting stay while the Patent and Trademark Office reexamined plaintiffs patent and "could cancel or modify some of the asserted claims of the patents"); *Commonwealth of Virginia ex rel. Integra Rec LLC v. Countrywide Sec. Corp.*, 2015 WL 222312, at *2 (E.D. Va. Jan. 14, 2015) (stay granted pending decision by Judicial Panel on Multidistrict Litigation on whether to transfer case to MDL proceeding pending in another district).

Defendants can cite no case where a court has stayed consideration of its own subject-matter jurisdiction while an unrelated case went forward, in the early stages of the litigation or otherwise. To the contrary, federal courts have a bedrock obligation to "police" the limits of their own subject-matter jurisdiction. *See, e.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level."); *see also, e.g.*, *Shield Our Const. Rts. & Just. v. Hicks*, 2009 WL 3747199,

at *2 (D. Md. Nov. 4, 2009) ("A court must satisfy itself of its own jurisdiction.") (citing *Andrus v. Charlestone Stone Prods. Co., Inc.,* 436 U.S. 604, 608 n. 6 (1978)). The Court's jurisdiction is in significant doubt, and it should not indefinitely withhold consideration of a meritorious motion to remand. The open-ended stay Defendants request is not warranted considering the procedural posture of this case, because no pending litigation will affect the merits of the City's Motion to Remand.

C. Defendants Will Not Suffer Any Hardship as Remand Briefing Proceeds.

Defendants "substantial hardship" arguments are a baseless ruse to prevent this Court from expeditiously determining jurisdiction. Mot. at 9–10. The only matter that will go forward absent a stay is the City's Motion to Remand. Defendants will not be required to participate in discovery, dispositive motions, or even responsive pleadings until the appropriate forum is determined. Briefing a jurisdictional motion that this Court will inevitably need to resolve is not hardship—it is litigation. And "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.).

Defendants theorize that if this Court grants the City's soon-to-be-filed Motion to Remand, Defendants may be forced to appeal that decision and simultaneously proceed in state court. But what Defendants describe is exactly what occurred in *Baltimore* after the defendants' motion to stay pending appeal were denied. The parties proceeded in Maryland state court while Defendants appealed the remand order to the Fourth Circuit and then petitioned the Supreme Court for a writ of certiorari from that decision. It is also what is currently happening in the analogous cases brought by the City and County of Honolulu and the County of Maui; the district court granted the plaintiffs' motions to remand, the district court and Ninth Circuit denied stays pending appeal, and

the cases have returned to the Hawaii state courts while the defendants appeal the remand order. *See City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 839439, at *1 (D. Haw. Mar. 5, 2021) (denying stay of execution of remand order pending appeal); *City & Cty. of Honolulu v. Sunoco LP*, No. 21-15313, 2021 WL 1017392, at *1 (9th Cir. Mar. 13, 2021) (denying motion to stay remand order pending appeal, in part because defendants "have not made a sufficient showing on the merits considering our recent opinions rejecting the very same jurisdictional arguments advanced in the motions to stay").

The remaining "hardship" argument Defendants advance is speculative at best. Defendants posit that if this Court grants the City's Motion to Remand but a higher court ultimately finds that removal was proper—which, again, is an issue not properly before Supreme Court in *Baltimore*, and on which no court has sided with Defendants—they would have been denied the federal forum for a period of time. *See* Mot. at 10. This Court rejected a similar argument when it denied the defendants' motion to stay in the *Baltimore* litigation: "[E]ven if the remand is vacated on appeal, interim proceedings in state court may well advance the resolution of the case in federal court. After all, the parties will have to proceed with the filing of responsive pleadings or preliminary motions, regardless of the forum." *Mayor & City Council of Baltimore v. BP P.L.C.*, 2019 WL 3464667, at *6.

Defendants' reliance on *Pagliara v. Federal Home Loan Mortgage Corp.*, 2016 WL 2343921 (E.D. Va. May 4, 2016), is misplaced. The plaintiff in *Pagliara* filed two nearly identical actions for inspection of books and records of the defendant while five other similar actions against that defendant were awaiting a transfer decision by the Judicial Panel on Multidistrict Litigation ("JPML"). *Id.* at 1-2. The *Pagliara* court stayed the plaintiff's case until the JPML decided the transfer motion—a minimum of 22 days and a maximum of a few months—so that, among other

reasons, the defendant would not have to proceed in discovery on the exact same issue in the plaintiff's individual case that would potentially be transferred to, and resolved in, the pending MDL proceeding. *Id*. at *3. As detailed above, the sole issue before the Supreme Court in *Baltimore* concerns appellate jurisdiction and cannot affect this Court's substantive resolution of the City's remand motion. There is simply no duplication of effort that would occur by allowing the parties to brief remand.

Defendants' reliance on *Ewing Industries Corp. v. Bob Wines Nursery, Inc.*, 2015 WL 12979096 (M.D. Fla. Feb. 5, 2015) is also inapposite. The *Ewing* court stayed resolution of the defendants' motion for summary judgment on a plaintiff's individual claims while that plaintiff's class action claims were being appealed to the Eleventh Circuit. It was possible that the Eleventh Circuit's decision regarding the class claims could affect the merits of the remainder of the plaintiff's individual claims. *See id*. at *2. Not so here. Regardless of the disposition of *Baltimore* in the Supreme Court, further briefing on the City's motion to remand must proceed, and this Court will have to decide the motion. Delaying the inevitable only harms the City. Defendants have not shown any burden that justifies staying remand briefing. This case should proceed.

D. Multiple Courts Have Denied Stays in Analogous Cases.

Federal courts around the country have repeatedly addressed and rejected virtually all the arguments Defendants make here, denying motions to stay pending appeal in multiple analogous cases. There was no reason to delay execution of remand orders in those cases, and there is no reason to delay consideration of the City's remand motion here.

1. Baltimore

In *Baltimore*, following this Court's order remanding the case, this district court, circuit court, and Supreme Court all denied stays pending appeal of the order. *See Baltimore* Stay Denial,

2019 WL 3464667, at *1 (denying motion to stay pending appeal to the Fourth Circuit); Quiñones Decl., Ex. 1: Order, *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 19-1644 (4th Cir. Oct. 1, 2019) (denying motion for stay pending appeal); *BP P.L.C. v. Mayor & City Council of Baltimore*, 140 S. Ct. 449 (2019) ("Application for stay presented to The Chief Justice and by him referred to the Court denied."). This Court found that a stay pending appeal 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." *Baltimore* Stay Denial, 2019 WL 3464667, at *4. The Court also 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" which was at most a "speculative harm." *Id.*

This 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." *Id.* at *6. The Court held to the contrary that denial of the stay was warranted because the case was in "its earliest stages," litigation on the merits of the City's claims should not be delayed, and "the interim proceedings in state court may well advance the resolution of the case in federal court" because "the parties will have to proceed with the filing of responsive pleadings or preliminary motions, regardless of the forum." *Id*. The Fourth Circuit and the Supreme Court also denied stays, without discussion. *See* Order, *Baltimore*, No. 19-1644 (4th Cir. Oct. 1, 2019); 140 S. Ct. 449.

2. Rhode Island

The district court in *Rhode Island* also denied the defendants' motion to stay pending appeal, as did the First Circuit and Supreme Court. *See* Quiñones Decl., at Ex. 2, 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."); Quiñones Decl. Ex. 3, 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.").

3. Boulder

The district court also denied a stay pending appeal from its order granting remand to state court in *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 423 F. Supp. 3d 1066 (D. Colo. 2019). The court rejected defendants' argument that the case "raise[d] 'complex and novel questions'" regarding federal officer jurisdiction, holding that their attempt to "re-hash" the same arguments as to federal officer did not "demonstrate a likelihood of success on appeal." *Id*. at 1073. The court likewise held that the Defendants had not shown a strong likelihood of success on the merits of their federal common law claim, or their *Grable* arguments. *Id*. The court also rejected Defendants' arguments as to irreparable injury, holding that simultaneously litigating the case in state court and before the circuit court did not constitute irreparable harm, the "argument that discovery could be unduly burdensome in state court [was] speculative," and "state court rulings present[ed] [no] issues of comity," because "[i]t is not unusual for cases to be removed after substantial state litigation." *Id.* at 1074 (quotations and

citations omitted). Finally, the court also found that plaintiffs would be injured by further delay on the merits of their claims, and the public interest weighed in favor of denying the stay. *Id*. at 1075.

4. Honolulu

Like the *Baltimore* and *Boulder* district courts, the *Honolulu* district court also found each factor weighed in favor of denying a stay. The court found that the Ninth Circuit had already "addressed the sole issue from which Defendants can appeal with certainty," namely federal officer removal, and that their other assertions depended on "multiple contingencies," that required "success in the Supreme Court and many further successes in the Ninth Circuit." *Honolulu*, 2021 WL 839439, at *2. The court also rejected defendants' arguments as to irreparable harm, holding that defendants "rely on speculation on what may befall them if they have to litigate in State court," and finding that "the purported injury of litigating in State court is simply a natural consequence of Defendants failing to demonstrate that these cases were properly removed." *Id*. The court also found there was no public interest in further delay. *Id*. at *3.

The defendants then applied to the Ninth Circuit for an emergency stay pending appeal, which that court also denied. *City & Cty. of Honolulu v. Sunoco LP*, No. 21-15313, 2021 WL 1017392 (9th Cir. Mar. 13, 2021). The circuit court held that requiring parties to litigate the merits of a plaintiff's claims in state court simultaneously with appellate proceedings—even if such requirement leads to increased litigation burdens and possible inefficiencies if the court later finds the cases were properly removed—"do[es] not rise to the level of irreparable harm." *Id*. at *1. The court also held that "the theoretical possibility that the state court could irrevocably adjudicate the parties' claims and defenses while these appeals are pending also falls short of meeting the demanding irreparable harm standard." *Id*. Finally, the court concluded the defendants had not

made a sufficient showing of success on the merits given the court's previous opinions "rejecting the very same jurisdictional arguments advanced in the motions to stay." *Id*.

Court after court has rejected Defendants' delay tactics after correctly remanding analogous cases to state court. There is even less reason to delay even briefing the City's motion to remand, which this Court will have to resolve in any event. This Court must be allowed to determine if it has jurisdiction expeditiously, and must deny Defendants' Motion to Stay.

IV. CONCLUSION

Granting a stay in this case could delay for a year—or more—the City's right to proceed on its purely state law claims in state court, and prevent this Court from deciding threshold jurisdictional issues that all parties in all cases agree should be decided by the district courts in the first instance. For all these reasons, the Court should deny Defendants' Motion.

Dated: April 21, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 21st 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.

/s/ Martin D. Quiñones
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